(22,263)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 106.

THE ARIZONA COPPER COMPANY, LIMITED, APPELLANT,

vs.

WILLIAM ALLEN GILLESPIE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 15, 1912.

a In the Supreme Court of the Territory of Arizona.

No. 1052.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Appellant,
vs.
WILLIAM ALLEN GILLESPIE, Appellee.

On appeal from the District Court of the Fifth Judicial District of the Territory of Arizona in and for the County of Graham.

Kibbey, Bennett & Bennett and M. J. Egan, Esq., attorneys for Appellant.
Thos. Armstrong, Jr., Esq., attorney for appellee.

Bt it remembered that on to-wit: the sixteenth day of March, 1908, came the appellant in the above entitled cause, by its attorneys, Mr. Walter Bennett and Mr. M. J. Egan, and filed in the clerk's office of said court, in said entitled cause, a certain Judgment Roll in words and figures following, to-wit:

1 In the District Court of the Fifth Judicial District of the Territory of Arizona in and for the County of Graham.

WILLIAM ALLEN GILLESPIE, Plaintiff,
vs.
THE SHANNON COPPER COMPANY, a Corporation; THE ARIZONA Copper Company, Limited, a Corporation, and The Arizona Copper Company, a Corporation, Defendants.

Complaint.

Comes now the plaintiff by his attorneys, Armstrong and Lewis, and for his cause of action alleges:

I.

That plaintiff is now and at all times hereinafter mentioned has been a resident of the County of Graham and Territory of Arizona.

That the defendant, the Shannon Copper Company is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of
2 business in the City of Dover, County of Kent and State of Delaware.

That the defendant, The Arizona Copper Company, Limited, is a corporation duly organized and existing under and by virtue of the laws of Scotland, with its principal place of business in Scotland.

That the defendant, The Arizona Copper Company is a corporation duly organized and existing under and by virtue of the laws of

the Territory of Arizona, with its principal place of business in the City of Clifton, County of Graham and Territory of Arizona.

II.

That the Gila River rises in the Territory of New Mexico and flows thence through a generally mountainous country through the County of Graham and other counties in the Territory of Arizona, in a westerly direction into the Colorado River, at or near the City of Yuma in the Territory of Arizona.

That the San Francisco River is an affluent of the said Gila River, emptying its waters into the said Gila River at or near the City of Clifton aforesaid, and above the head of the Montezuma and other canals hereinafter described. That Chase Creek is an affluent of the said San Francisco River, emptying its waters into the said San Francisco River above the said City of Clifton; that each and all of said streams are public streams within the said County of Graham and the waters thereof are applicable to the purposes of irrigation and domestic use.

That the waters of said several streams were, at all times prior to the commission of the acts of defendants hereinafter com-
3 plained of, pure, clear, and free from substances poisonous in their nature and injurious to plant life and detrimental to the fertility of the farming lands hereinafter described, and of a nature and character well suited to the purposes of irrigation and domestic use.

III.

That the plaintiff is the owner in fee simple, and the occupant of all that portion of the south one-half of the northwest one-quarter of Section thirteen lying and being south of the Union Canal, and the north one-half of the southwest one-quarter of said section, and the southeast one-quarter of the southwest one-quarter of said section, and the west one-half of the southeast one-quarter of said section, and that certain tract of land in said section commencing at a point being the south west corner of the east one-half of the southeast one-quarter of said section, thence in an easterly direction along the south line of said section 405 feet to a point, thence in a northerly direction parallel with the east said section line 1563 feet to a point, thence in an easterly direction parallel with the south said section line 37¾ feet to a point, thence in a northerly direction parallel with the east said section line 1064½ feet to a point on the north line of said southeast quarter of said section, thence along said last mentioned north line in a westerly direction 442¾ feet to a point, being the northwest corner of the east half of said quarter section, thence in a southerly direction along the west line of said east half of said quarter section to the place of beginning, all of said land being in Township 7 South, Range 26 East of the Gila & Salt River Base and Meridian, and in the County of Graham and Territory of Arizona, and containing in all 276 acres, more
4 or less; and plaintiff alleges upon information and belief that heretofore, to-wit: In the year 1872 the predecessors in interest

of said plaintiff appropriated of the public waters of said Gila River, and diverted by and through the Montezuma Canal hereinafter described, 140 inches of water, miners' measurement, and applied said water to said land for the purpose of the irrigation thereof and the cultivation of grain, alfalfa, trees, vines, melons, vegetables and other agricultural products, and for drinking and domestic use, in connection with said premises; that thereafter the predecessors in interest of said plaintiff and said plaintiff continued and now continues to so divert and use said quantity of water upon and in connection with the said land for the purposes aforesaid.

IV.

That the said Montezuma Canal, by and through which this plaintiff diverts the water appropriated for use upon said land as aforesaid, at all the times mentioned herein, headed and now heads at a point upon the bank of said Gila River at or near the southwest corner of the northeast quarter of the northeast quarter of Section 17, Township 7 South, Range 26, East, G. & S. R. B. & M., in said Graham County at a distance of about 25 miles below the confluence of the said San Francisco River and the said Gila River; that commencing at said head of the said Montezuma Canal and extending out into and across the said Gila River, was at all the times mentioned herein and now is maintained a dam for the purpose of diverting the waters of said Gila River into said canal; that said Montezuma Canal was at all the times mentioned herein and is now of a capacity sufficient to, and did and now does divert and carry 3,000 inches of water, miners' measurement, of, out of and from the said Gila River, and at all of said times said canal extended and now extends out through the farming lands of the valley commonly known and called the Upper Gila Valley, a distance of 13½ miles, all within the said County of Graham; that said canal at all the times mentioned herein carried and now carries the public waters of said Gila River for the irrigation of more than 3750 acres of land to which said water was and now is appropriated, diverted and applied by the owners and occupants thereof for agricultural purposes and drinking and domestic uses in connection therewith, amongst others, to the lands of this plaintiff; that said canal and dam was at all the times mentioned herein, and now is maintained by the owners of said lands and this plaintiff, for the uses and purposes aforesaid.

V.

And this plaintiff further alleges that in the said Upper Gila Valley and County of Graham and from a point on said Gila River at or near eighteen miles below the confluence of said San Francisco and said Gila Rivers, to a point fifty-three miles below said last named point, numerous irrigation ditches, amongst others, said Montezuma Canal, were taken out of said Gila River long prior to the commission of the acts of defendants hereinafter complained of, by divers persons who were then and are now the owners and occu-

pants of irrigable lands lying upon either side of said Gila River, and by means of said ditches the public waters of river were ever since and now are appropriated, diverted, and applied to more than twenty-three thousand acres of irrigable lands so situated
6 under said canals and occupied by persons entitled to the use of said waters, amongst others this plaintiff; and the said lands theretofore desert and unproductive were reclaimed and were made to and do now produce alfalfa, grains, vegetables, melons, fruits, trees and vines; and plaintiff further alleges that at all the times hereinafter mentioned said ditches have been and are now maintained and said public water of said Gila River used upon the aforesaid land for the irrigation thereof and the cultivation of valuable crops as aforesaid, and for domestic and drinking purposes in connection therewith; and plaintiff further alleges that as a result of the use of said public waters of said Gila River as aforesaid, a rich and prosperous farming community has been established upon the lands aforesaid, supporting the towns of Solomonsville, of Safford and of Thatcher, in all a community of more than eight thousand persons.

VI.

And plaintiff further alleges that in the mountains through which the said Gila River and its said affluents flow, and in the neighborhood and surrounding the town of Clifton aforesaid, and the towns of Morenci and Metcalf, and within the said County of Graham, are numerous deposits of copper ores to an extent to this plaintiff unknown, but this plaintiff upon information and belief alleges that said defendants have developed blocked out and exposed more than one hundred million tons of copper ore upon properties owned by them, which can and will be reduced and treated by the said defendants as hereinafter alleged; that for many years last past said ores have been mined, reduced and treated by the said defendants to an extent and amount to this plaintiff unknown,
7 but this plaintiff alleges upon information and belief that vast quantities and more than fifteen millions of tons of ore have been by said defendants mined, reduced and treated as hereinafter set forth; that for the purpose of reducing and treating the said ores so mined as aforesaid, the said defendant companies have each and all established upon the banks of said San Francisco River and said Chase Creek and upon the sides of the canons debouching into said last named streams, leachers, smelters and concentrators of a capacity sufficient to, and which now actually reduce and treat, as plaintiff is informed and verily believes and states the fact to be, more than 100,000 tons of copper ore each and every month; that in the treatment of said ores by the said defendants in the mills operated by the said defendants as aforesaid, the said ores are crushed and mixed with water, which said water is diverted and taken in its pure and natural condition from the affluents of the said Gila River by the said defendants and applied by the said defendants to said use, to the amount of 1200 inches, miners' measurement; that said ores when so crushed and mixed with water as aforesaid, are deprived of their mineral content, which this plain-

tiff is informed and believes and alleges the fact to be is not to exceed five per centum of the whole thereof and the residue and remainder thereof, mixed with water as aforesaid, consisting of finely pulverized rock, slime and coarser sediment, is by the said defendants returned to the said streams and thence carried by and through the said streams and irrigation ditches to and upon the lands of this plaintiff and others like situate.

VII.

8 And this plaintiff further alleges that although the said slimes, tailings and sediments so deposited by the said defendants in said streams as aforesaid are deposited from separate and distinct mills operated by the several defendants and in separate and distinct places, yet, nevertheless said slimes, tailings and sediments from said several mills owned and operated by said several defendants, become commingled in an indistinguishable mass in the waters of the said Gila River and its said affluents above the head of the said Montezuma Canal and above the head of the uppermost of said several canals, and this plaintiff alleges the fact to be that each of said defendants, by and through their several mills, deposits slimes, tailings and sediments in the said affluents of the said Gila River and thereby contributes to the injury hereinafter complained of by this plaintiff.

VIII.

And this plaintiff further alleges that all of said mills so erected by the defendants as aforesaid were erected by, and said water so appropriated, diverted and used by the said defendants in the milling uses as hereinbefore alleged, was appropriated, diverted and used for said milling purposes by said defendants and each of them long subsequent to the said appropriation of water by this plaintiff and others owning and occupying land in the said farming community aforesaid, and with full knowledge on the part of said defendants and each of them of the prior appropriation, diversion and use by the plaintiff and said others in said farming community, of said waters of said Gila River and its said affluents in its pure and unpolluted state.

IX.

9 And plaintiff further alleges upon information and belief that said defendants have by, through and from their mills as aforesaid, deposited in said Chase Creek, tailings, slimes and sediments, which said tailings, slimes and sediments so deposited by the defendants as aforesaid, have filled and now fill the bed of said Chase Creek to a depth of from twelve to fifteen feet; that said defendants have, by, through and from their said mills as aforesaid, deposited in the said San Francisco River and also into said San Francisco River by and through the said Chase Creek and the several canons debouching into said Chase Creek and into said San Francisco River, tailings, slimes and sediments, which

said tailings, slimes and sediments, so deposited by the defendants as aforesaid, have filled and do now fill the bed of said San Francisco River to a depth of three to five feet; that said defendants have, by, through and from their said mills as aforesaid, deposited by and through the said Chase Creek, the said canons and the said San Francisco River, in the bed of the said Gila River below the mouth of the said San Francisco River and above the head of the uppermost of the said irrigation canals, tailings, slimes and sediments, which said tailings, slimes and sediments so deposited by the defendants as aforesaid, have filled the bed of the said Gila River to a depth of about four feet, and this plaintiff further alleges that the amount of said tailings, slimes and sediments deposited by the defendants in the said Chase Creek, the said canons, the said San Francisco River and the said Gila River, is increasing, and the said defendants are now increasing the amount of the deposits of tailings, slimes and sediments in said creeks, canons and rivers, and said defendants threaten to, and will, unless restrained by the order of this Court, continue the deposit as
10 aforesaid and will increase the said deposits therein. And this plaintiff further alleges that said slimes, tailings and sediments so deposited in said creeks, canons and rivers are composed of inert substances injurious to and destructive of the fertility of the soil of said lands of the Upper Gila Valley irrigated by the waters of said Gila River, amongst others, the lands of this plaintiff, and that said slimes, tailings and sediments so deposited in the beds of the said canons and streams by the defendants as aforesaid, have been conducted and carried from the said Gila River through the said canals to and upon the said lands of the said Upper Gila Valley, irrigated as aforesaid, amongst others, to and upon the said land of this plaintiff, to the injury of the said land and the impairment of the productiveness thereof, and to the damage of the owners of the said lands, amongst others, this plaintiff. And this plaintiff further alleges that by reason of the deposits and continuance of deposits of slimes, tailings and sediments by defendants as aforesaid, in the said Gila River and its affluents, the said slimes, tailings and sediments are rapidly encroaching upon and will rapidly encroach upon the heads of the said irrigating canals and particularly the head of the said Montezuma Canal, and will, unless the deposit thereof by the defendants is restrained by the order of this Court, destroy the heads and dams of said canals, and particularly the head and dam of the Montezuma Canal to the great injury and damage of the owners of lands thereunder, and particularly to the damage of this plaintiff; and this plaintiff further alleges that by reason of the deposits of slimes, tailings and sediments by the defendants as aforesaid, the lands under the said canals, and particularly the lands of
11 this plaintiff, are exposed to damage and destruction by the carrying out from the bed of the said Gila River and its said affluents of the slimes, tailings and sediments deposited therein by defendants as aforesaid to and upon the said lands, which said damage and liability to destruction is constantly increasing as the amount of slimes, tailings and sediments so deposited by the defendants as

aforesaid increases; and this plaintiff alleges that unless said deposit of tailings, slimes and sediment, by the defendants, in said rivers and their said affluents, is restrained by the order of this Court, the fertility of said lands under the said canals, and particularly the fertility of said lands of this plaintiff, will be wholly destroyed to their and his great damage.

X.

And this plaintiff further alleges that the said defendants deposit in the said Gila River and its affluents, slimes and tailings of exceeding fineness, impregnated with copper, acids and other chemicals, which said slimes and tailings impregnated with acid, other chemicals and copper so deposited by the said defendants as aforesaid, at all times foul and poison the public waters of the said Gila River and destroy the fish therein and render the said water, which would otherwise be pure and wholesome, unfit for ordinary drinking and domestic use, to the damage of the public and of this plaintiff.

XI.

And this plaintiff further alleges that the said defendants deposit in the said Gila River and its said affluents, slimes and tail-
12 ings as aforesaid, composed of finely pulverized rock, which at all times foul the public waters aforesaid, and particularly the waters appropriated, diverted and used and now being diverted and used by this plaintiff upon the said lands of plaintiff aforesaid; that the usefulness of said waters, so fouled by the defendants as aforesaid, for irrigation, is greatly impaired in this, that the more finely pulverized materials so deposited in said waters by said defendants, consisting of finely powdered slate, limestone and other inert substances, are carried in suspension in the waters of the said Gila River and its said affluents, through the head of the said Montezuma Canal to and upon the land of plaintiff hereinbefore described, and plaintiff alleges that said tailings and slimes are deposited from said water in the usual course and practice of irrigation, upon said lands and fields of said plaintiff, forming thereon a coating of inert matter, impervious to air and not readily soluble in water, which substance binds around the roots of alfalfa and grains now and heretofore growing upon said land, preventing the proper and usual growth thereof and lessening the yield and killing the said crops to the damage of this plaintiff; and this plaintiff further alleges that said inert matter so deposited in irrigation, prevents the growth upon said lands of tender vegetables, vines, and melons, to his damage; that said substances so deposited as aforesaid, are wholly inert and that the constant application thereof to the said land decreases the fertility thereof, to the great and increasing injury of plaintiff. And this plaintiff further alleges that the said substances so deposited by defendants as aforesaid increase the amount of water necessarily used and the number of irrigations required for the proper
13 cultivation of his said crops upon his said land to the great and increasing injury of plaintiff.

XII.

And plaintiff further alleges that the injuries complained of by plaintiff herein are continuously and constantly increasing; that plaintiff has no adequate remedy at law for the redress of the said injuries caused him by the said defendants, in this, that the damages caused to plaintiff by the acts of defendants as aforesaid are of a nature not readily susceptible of proof in an action at law for damages; that said injuries so caused by defendants as aforesaid are recurrent and in their ultimate effect irreparable; that the defendants threaten to and will, unless restrained by the order of this Court, continue to deposit and to increase the deposit of slimes, tailings and chemicals as hereinbefore alleged to the damage of this plaintiff.

Wherefore plaintiff prays that an injunction issue to the defendants and each of them perpetually restraining them and each and every of them from depositing in the waters of the said Gila River, the said San Francisco River, the said Chase Creek and in the affluents of any and all of said streams any slimes, tailings, concentrates and chemicals.

That the plaintiff be decreed such other and further relief as to the Court shall appear just and meet in the premises and costs incurred and expended herein.

ARMSTRONG & LEWIS,
Attorneys for Plaintiff.

TERRITORY OF ARIZONA,
County of Graham, ss:

William Allen Gillespie, being first duly sworn, on oath
14 deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge excepting as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

W. A. GILLESPIE.

Subscribed and sworn to before me this 20th day of September, 1906.

[SEAL.] GEORGE H. SMALLEY, *Clerk.*

Filed April 20th, 1906.

Here follows the Summons and a Stipulation as to time to answer, copies of which are omitted by direction of attorneys for appellant.

Then follows the Answer of the Shannon Copper Company filed December 20, 1906, but as plaintiff subsequently dismissed his complaint as to that company, and no judgment was rendered against it, the Answer of the Shannon Copper Company is omitted by direction of attorneys for appellant.

Then follows the Answer of the Arizona Copper Company, Ltd., copy of which is omitted by direction of attorneys for appellant, an Amended Answer having been filed.

Then follows the Answer of the Arizona Copper Company, filed

December 20, 1906, but as it was a nominal party only, and no relief was asked or judgment rendered against it, its answer is omitted by direction of attorneys for appellant.

15 (Title of Court and Cause).

Amended Answer.

Comes now the defendant, the Arizona Copper Company, Ltd., and for this, its Amended Answer:

I.

Demurs to the plaintiff's complaint herein and shows that the said complaint does not state facts sufficient to constitute any cause of action against this defendant.

II.

And this defendant, demurring specially to the plaintiff's complaint, shows that it appears upon the face of the complaint that the alleged wrongs complained of were committed and are being committed by the said several defendants severally and independently and not jointly, and that therefore there is a defect of parties
16 to this action, in this, that there is a misjoinder of parties defendant to this action and that the several defendants are improperly joined as defendants in this action.

III.

And should the above demurrer be overruled, this defendant further answering said complaint admits the residence of the plaintiff and the corporate character of this defendant to be as alleged in paragraph I of plaintiff's complaint.

IV.

Admits the allegations of the first two clauses of paragraph II of plaintiff's complaint, and denies that the waters of the streams mentioned in plaintiff's complaint were, prior to the alleged acts complained of, pure, clear, or free from substances poisonous in their nature or injurious to plant life or detrimental to the fertility of the farming lands described in plaintiff's complaint or of a nature or character well suited to the purposes of irrigation or domestic use.

V.

That this defendant has no knowledge as to the facts alleged in paragraphs III and IV of plaintiff's complaint and therefore denies the same and asks that plaintiff may be required to make strict proof thereof.

VI.

This defendant, further answering, admits that it is engaged in the mining and reduction of copper ore at or near the town of
17 Clifton, Arizona; that its concentration and reduction works in which said ores are treated and reduced are situated upon or adjacent to the streams and canons debouching into the affluents of the said Gila River and that a portion of the tailings and waste material from said reduction works is carried by the water used in said reduction works into the said streams and canons, and thence into the Gila River; but this defendant denies that the said tailings and waste material which are so deposited by this defendant and which so find their way into the waters of the Gila River are in such quantity or of such quality as to render the waters of said Gila River unfit for domestic use or for the irrigation of the lands of the plaintiff, or injurious to or destructive of the fertility of the soil to which the said waters of the Gila River are applied, but on the contrary this defendant is informed and believes and therefore so states the fact to be that the said waste material and tailings from the reduction works of this defendant which find their way into the said Gila River and thence to the lands irrigated therefrom are in such quantity and of such quality that the lands irrigated therefrom with proper cultivation are not damaged thereby, but are greatly benefited and rendered more fertile and productive.

VII.

And this defendant denies that the said waste material and tailings from the reduction works of this defendant are deposited in and are encroaching upon the heads of the irrigation canals, diverting water for irrigation from said Gila River, and denies that the said materials and tailings are about to or will injure or destroy or in any way obstruct the heads or dams of said canals
18 as alleged in paragraph IX of plaintiff's complaint.

VIII.

And this defendant denies that any waste material, slime or tailings deposited in the said Gila River or its tributaries are impregnated with copper, acids or other chemicals, and denies that the said waste materials and tailings from this defendant's reduction works poison the waters of said Gila River or render the said waters thereof unfit for drinking or domestic use, as alleged in paragraph XI of plaintiff's complaint.

IX.

And this defendant denies that the plaintiff has suffered any damage or injury by reason of the deposit of waste materials and tailings from the reduction works of defendant in the waters of the Gila River or its tributaries, and denies that the same are constantly increasing or increasing at all, and denies that plaintiff has no adequate remedy at law, and denies that the damages suffered by plaintiff, if plaintiff has suffered any damages, are not readily susceptible of

proof in an action at law and denies that this defendant has caused any damages to plaintiff which are recurrent or that their ultimate effect is or will be irreparable.

X.

This defendant, further answering plaintiff's complaint, denies each and every allegation therein contained not hereinbefore specifically admitted or denied.

XI.

Furthering answering plaintiff's complaint, this defendant
19 alleges that this defendant for a long time prior to the commencement of this action, to wit, for 20 years last past, has been operating its mining and reduction works at the same place and in the same manner in which it is now operating the same; that the amount of waste material and tailings from said works which now find their way from said works into the waters of the Gila River and its tributaries is practically of the same quality and character, and less in quantity than the same has been during the whole of said period.

That this defendant has expended large sums of money in a bona fide effort to impound said waste material and tailings, to-wit, the sum of one hundred thousand dollars, and that this defendant is now expending other large sums of money in a bona fide effort to reduce the amount of such waste material and tailings so finding their way from the reduction works of defendant to the waters of said Gila River, and intends to and will in every practical way use its best efforts to reduce to a minimum the amount of said waste materials and tailings which find their way from its said reduction works to the waters of said Gila River, and that by the money and labor already expended by this defendant the amount of said waste and tailings so finding their way into the waters of the Gila River from the works of this defendant has greatly diminished and is now constantly diminishing, and will, by reason of the said efforts of this defendant, constantly continue to diminish.

XII.

This defendant, further answering plaintiff's complaint, alleges that for many years last past, to-wit, for more than twenty years, it
has been in the mining and reduction of copper ore on or
20 near the upper branches and affluents of the Gila River; that during all of said times the mines and reduction works of this defendant have been and now are so located that it is impossible to operate the same and at the same time prevent some portion of the tailings and fine sediment held in solution in the water from said works from finding its way into the waters of the Gila River. That this defendant is now using every reasonable effort to reduce the amount of such sediment and tailings from said works which find their way into the waters of said Gila River. That if this defendant should be restrained and enjoined by this Court from so operating its mines, smelters and reduction works aforesaid except so as to

prevent any portion of said tailings and sediment therefrom from flowing and finding its way into the waters of the said Gila River, this defendant would be compelled to shut down all of said mining, smelting and reduction works and cease from operating the same.

That this defendant has invested a very large amount of money in the development of said mines and in the installation and equipment of the smelting and reduction works used by this defendant in the smelting and reduction of the product of said mines, and has continually added to and increased its said plant, and the volume of its operations since the year of 1882 to the knowledge of the plaintiff and without his complaint or protest.

That at the present time this defendant in its many operations, smelting and reduction works, gives employment to a large number of men, to-wit, about two thousand, and that a still larger number, to-wit, as this defendant is informed and believes, twelve thousand people, are directly dependent upon the operation of said
21 works for a livelihood, and that the shutting down of said mining operations, and smelting and reduction works, by reason of such restraining order and injunction, would cause great loss and suffering to the employees of this defendant and those depending upon them, and great financial loss and irreparable damage to this defendant, and that such loss and suffering and damage would be so vastly greater than the loss or damage to plaintiff, if any, by reason of the operation of said works, as alleged in said complaint, as to be out of all proportion thereto.

Wherefore, this defendant prays that this action may be dismissed as to this defendant and that this defendant have judgment for its costs and disbursements herein.

M. J. EGAN,
WALTER BENNETT,
Attorneys for Defendant Arizona Copper Company, Ltd.

TERRITORY OF ARIZONA,
County of Graham, ss:

M. J. Egan, being first duly sworn, on his oath says: That he is one of the attorneys of said defendant, The Arizona Copper Company, Ltd., and makes this affidavit for and on behalf of this defendant; that he has read the foregoing answer and knows the contents thereof and that the matters and things therein stated are true of his own knowledge, except such as are stated on information and belief, and as to those matters he believes it to be true.

M. J. EGAN.

Subscribed and sworn to before me this 18th day of April, 1907.

W. R. CHAMBERS,
Clerk District Court.

Filed April 18th, 1907.

22 Here follows The Shannon Copper Company's motion to strike, copy of which is omitted by direction of attorneys for appellant.

(Title of Court and Cause Omitted.)

Motion to Strike.

Comes now the defendant, The Arizona Copper Company, Ltd., and moves the Court to strike from the plaintiff's complaint herein the following paragraphs and parts of paragraphs therein:

Strike out paragraph 4 of said complaint, for the reason that the matter therein stated is irrelevant and immaterial and is surplusage.

Strike out paragraph 5 of said complaint for the reason that the matter therein stated is irrelevant and immaterial and is surplusage.

Strike out the words "and others like situate" at the end of paragraph 7 of said complaint, for the reason that the same is irrelevant and immaterial.

Strike out the words "and others owning and occupying lands in said farming community aforesaid" from paragraph 8 of said
23 complaint, for the reason that the same is irrelevant and immaterial and is surplusage.

Strike out from said complaint the whole of paragraph 9 for the reason that the matter therein stated is irrelevant and immaterial and surplusage, and is a repetition of matter elsewhere alleged in said complaint.

M. J. EGAN,
WALTER BENNETT,
Attorneys for Defendant Arizona Copper Co., Ltd.

Filed April 17th, 1907.

Here follows an Agreement between The Shannon Copper Company and Wm. A. Gillespie and others; Findings of Fact proposed by Defendant The Arizona Copper Company, Ltd.; Findings of Fact and Conclusions of Law signed by the trial Judge; copies of which are omitted by direction of attorneys for appellant.

(Title of Court and Cause.)

Judgment.

This cause coming on regularly for trial before the Court without a jury, Hon. F. S. Nave presiding, and the plaintiff appearing by his attorneys, Messrs. Armstrong & Lewis, and the said defendants,
24 The Shannon Copper Company, a corporation; The Arizona Copper Company, Limited, a corporation, and The Arizona Copper Company, a corporation, appearing by their attorneys, Walter Bennett and M. J. Egan, Esqs., and upon motion of plaintiff's attorney the complaint having been dismissed as against The Shannon Copper Company and The Arizona Copper Company and the said cause having been continued for trial as against The Arizona Copper Company, Limited a corporation, and the Court having heard and considered the evidence offered by the respective parties

and the arguments of counsel, and having made and filed its Findings of Fact and Conclusions of Law herein, it is, by the Court, ordered, adjudged and decreed that the complaint of plaintiff be, and the same hereby is, dismissed as against the defendant, The Shannon Copper Company, and that said Shannon Copper Company do have and recover of the said plaintiff the sum of $—, its costs and disbursements incurred herein.

And it is further ordered, adjudged and decreed that the complaint of plaintiff be, and the same hereby is, dismissed as against The Arizona Copper Company, and that said The Arizona Copper Company do have and recover of said plaintiff the sum of $—, its costs and disbursements incurred herein.

And it is further ordered, adjudged and decreed that the
25 defendant, The Arizona Copper Company, Limited, its agents, servants and attorneys, are hereby perpetually enjoined and restrained from in any wise or in any manner depositing, or suffering or permitting to be deposited, or suffering or permitting to flow into the waters of the said Gila River, or into said San Francisco River, or said Chase Creek, in such manner that they may be carried into or enter into the waters of said Gila River, any slimes, slickens or tailings; this judgment to become operative May first, A. D. 1908, and not prior thereto; and that the said plaintiff do have and recover of said defendant, The Arizona Copper Company, Limited, the sum of $85.30, his costs and disbursements incurred herein.

Dated at Solomonsville, Arizona, this fifth day of November, 1907.

FREDERICK S. NAVE, *Judge.*

Filed January 4th, 1908.

(Title of Court and Cause.)

Motion for New Trial.

I.

Comes now the defendant, The Arizona Copper Company, Limited, a corporation, and moves the Court to set aside its findings and judgment in the above-entitled cause and to grant this defendant a new trial thereof upon the following grounds:

The Court erred in admitting incompetent and improper evidence offered by the plaintiff and objected to by the defendant.

II.

The court erred in refusing to admit proper evidence offered by this defendant.

III.

The findings of the Court are not supported by the evi-
26 dence in the case.

IV.

The findings of the Court are contrary to the weight of the evidence.

V.

The judgment of the Court is not supported by the findings of fact signed and filed by the Court.

VI.

The judgment of the Court is not supported by the evidence in the case.

VII.

The judgment of the Court is against the weight of the evidence and is contrary to the law of the case.

VIII.

The Court erred in adjudging and decreeing that this defendant be permanently enjoined and restrained from in any wise or in any manner disposing of, or suffering or permitting to be disposed, or suffering or permitting to flow into the waters of the Gila River, the San Francisco River or Chase Creek, any slime, tailings or sediment.

IX.

The Court erred in entering judgment for the plaintiff against this defendant for costs.

M. J. EGAN,
WALTER BENNETT,
Attorneys for Defendant Arizona Copper Co., Ltd.

Filed November 5th, 1907.

27 Here follows Plaintiff's Memorandum of Costs and Disbursements; and a Stipulation in regard to approval and certification by the trial Judge of the reporter's notes of the testimony as a bill of exceptions; copies of which are omitted by direction of attorneys for appellant.

28 *Minute Entries.*

APRIL 17, 1907.

In the District Court of the Fifth Judicial District of the Territory of Arizona in and for the County of Graham, April, 1907, Term.

WEDNESDAY, *April* 17, 1907.

Present:

Hon. Frederick S. Nave, Judge.
Lee N. Stratton, Esq., District Attorney.
A. A. Anderson, Sheriff.
W. R. Chambers, Clerk.
R. W. Sturgis, Reporter.

Order Opening Court.

Court was duly opened by the sheriff at 11:00 o'clock a. m., of this day, pursuant to recess.

Be it remembered, that on said day, the following order was made and entered, inter alia, in a cause wherein W. A. Gillespie is plaintiff, and The Shannon Copper Company et als. are defendants, which said order is in words and figures, following, to-wit:

Order Taking Motion and Demurrer Under Advisement.

1532.

W. A. GILLESPIE
vs.
SHANNON COPPER CO. et als.

29 And now comes Walter Bennett, Esq., of counsel for the defendants, and presses their motions to strike out certain portions of the complaint, and also the demurrer herein, and Thomas Armstrong, Jr., and George Lewis, Esq., appearing as counsel for the plaintiff, the said motions and demurrer are argued by the respective counsel and for consideration by the Court the same is taken under advisement.

Be it remembered, that on, to-wit, the 18th day of April, 1907, the same being one of the regular juridical days of the April, 1907, term of said Court, the following orders were made and entered, inter alia, in said cause in said Court, which said orders are in words and figures following, to-wit:

Call of Calendar. Setting of Cases for Trial.

1532.

W. A. GILLESPIE
vs.
SHANNON COPPER CO. et als.

It is hereby ordered that this case be and the same is hereby set for trial for Wednesday, May 1st, 1907.

Be it remembered, that on to-wit, the 19th day of April, 1907, the same being one of the regular juridical days of the April, 1907, term of said Court, the following orders were made and entered, inter alia, in said cause in said Court, which said orders are in words and figures following, to-wit:

Motion to Strike Denied.

1532.

W. A. GILLESPIE
vs.
THE SHANNON COPPER — et al.,

30 The motion to strike from the complaint certain portions thereof having been heretofore argued before the Court and

by the Court taken under advisement, the Court announces that the motion is, and it is hereby ordered that the said motion to strike be and the same is hereby denied.

Demurrer Overruled.

1532.

W. A. GILLESPIE
vs.
SHANNON COPPER Co. et als.

The demurrer herein having heretofore been argued by the respective counsel and taken under advisement by the Court, it is now ordered that the demurrer to the complaint be and the same is hereby overruled.

Be it remembered, that on to-wit, the 1st day of May, 1907, the same being one of the regular juridical days of the April, 1907, term of said Court, the following orders were made and entered, and proceedings had and recorded, inter alia, in said Court in said cause, which said orders and proceedings are in words and figures following, to-wit:

Dismissal as to One Defendant.

1532.

W. A. GILLESPIE
vs.
ARIZONA COPPER Co. et al.

On motion of the plaintiff it is hereby ordered that this case be and the same is hereby dismissed as to The Shannon Copper Company as per the agreement and stipulation now on file.

Trial.

1532.

W. A. GILLESPIE
vs.
ARIZONA COPPER Co. et al.

31 This being the hour for trial herein, comes now the plaintiff in person and by counsel, Thos. Armstrong, Jr., and George Lewis, his counsel, and the defendants by their counsel, M. J. Egan, Esq., and Walter Bennett, Esq., and the trial herein is ordered to proceed; thereupon the plaintiff calls as a witness in his behalf R. J. Young, and being sworn, he is examined and cross-

examined; thereupon the plaintiff offers in evidence a certain map, which is marked "Plaintiff's Exhibit A," and is admitted; thereupon plaintiff offers in evidence another certain map, which is marked "Plaintiff's Exhibit B," and is admitted; thereupon George A. Olney is called as a witness in behalf of the plaintiff and he is first duly sworn and is examined and cross-examined; thereupon the plaintiff offers certain evidence, being a deposit of a certain kind of rock or slime, which is marked "Plaintiff's Exhibit C," and is admitted; thereupon the Court suspended the trial herein until 2:00 o'clock p. m.

Trial Resumed.

1532.

W. A. GILLESPIE

vs.

THE ARIZONA COPPER CO. et al.

The plaintiff present by counsel as aforesaid, and the defendants present by counsel as aforesaid, it is ordered that the trial herein be resumed; thereupon the plaintiff recalls George A. Olney as a witness in his behalf and he is examined and cross-examined *and cross-examined;* thereupon M. J. Egan is caled as a witness in behalf of the plaintiff and after being first duly sworn he is examined and cross-examination waived; thereupon the plaintiff calls Andrew
32 Kimball as a witness and after being first duly sworn he is examined and cross-examined; thereupon W. A. Gillespie is called as a witness in his own behalf, and being first duly sworn, he is examined and cross-examined; and thereupon arising from said cross-examination, the defendants offer a certain bulletin issued by the University of Arizona, which is admitted and marked "Defendant's Exhibit 1;" and thereupon Frank Tyler, Turner West, A. F. West, and C. M. Layton are called as witnesses in behalf of the plaintiff, and each being first duly sworn, they are each examined and cross-examined; thereupon the hearing herein is continued until 9.00 a. m., Thursday, May 2nd, 1907.

Be it remembered, that on to-wit, the 2nd day of May, 1907, the same being one of the regular juridical days of the April, 1907, term of said court, the following orders were made and entered, and proceedings had and recorded, inter alia, in said Court in said cause, which said orders and proceedings are in words and figures following to-wit:

Trial Resumed.

1532.

W. A. GILLESPIE

vs.

THE ARIZONA COPPER COMPANY et al.

The plaintiff being present by his attorneys, Messrs. Armstrong & Lewis, and the defendants by their counsel, M. J. Egan, Esq., and

Walter Bennett, Esq., the trial herein is ordered to proceed; thereupon the plaintiff calls Oscar Layton, Free Hubbard, H. W. Bishop and W. W. Pace as witnesses in his behalf, and each, after
33 being first duly sworn, is examined and cross-examined; and thereupon the trial herein is ordered continued until 2:00 o'clock p. m., this day.

Trial Resumed.

1532.

W. A. GILLESPIE
vs.
THE ARIZONA COPPER CO. et al.

The plaintiff being present in person and by counsel, Messrs. Armstrong & Lewis, and the defendants by their counsel, M. J. Egan, Esq., and Walter Bennett, Esq., and the trial herein is ordered to proceed; thereupon W. A. Gillespie is recalled as a witness in behalf of the plaintiff, and he is examined and cross-examined; thereupon the plaintiff offers in evidence a certain "chunk or lump of solidified dirt, etc." which is admitted and marked "Plaintiff's Exhibit D;" thereupon Peter Andorsen is called as a witness in behalf of the plaintiff, and after first being duly sworn, is examined and cross-examined; thereupon R. J. Young is recalled as a witness in behalf of the plaintiff and he is examined and cross-examined; thereupon Richard Layton is called as a witness in behalf of the plaintiff, and being first duly sworn, he is examined and cross-examined; thereupon the plaintiff offers in evidence two bottles of liquid, which are admitted and marked respectively, "Plaintiff's Exhibit E," and "Plaintiff's Exhibit F;" thereupon on motion of the plaintiff the Court retired from the court room for the purpose of viewing some of the premises upon which it is alleged by the complaint the wrongs therein complained of are committed; thereupon the trial herein is ordered suspended and continued, until Friday, May 3rd, 1907, at 9:00 o'clock a. m.

34 Be it remembered, that on to-wit, the 3rd day of May, 1907, the same being one of the regular juridical days of the April, 1907, term of said Court, the following orders were made and entered, and proceedings had and recorded, inter alia, in said Court in said cause, which said orders and proceedings are in words and figures following, to-wit:

Trial Resumed.

1532.

W. A. GILLESPIE
vs.
THE ARIZONA COPPER CO. et al.

The plaintiff being present in person and by counsel, Messrs. Armstrong & Lewis, and the defendants by their counsel, M. J. Egan,

Esq., and Walter Bennett, Esq., the trial herein is ordered to proceed; thereupon the plaintiff rests; thereupon the defendants make orally the following motion, which it is ordered, that the clerk do enter in the minutes, to-wit: "The defendant now at the close of the plaintiff's testimony and after plaintiff has rested, moves the Court for judgment for the defendant, dismissing the plaintiff's complaint on the ground that the plaintiff has not introduced facts sufficient to support the cause of action alleged in his complaint and that in the present state of the evidence there is no evidence which would support a judgment, any judgment which the Court could enter under the pleadings in this case;" thereupon said motion is argued by the respective counsel and submitted to the Court for consideration and decision, and the Court being fully advised in the premises doth order that and the said motion is hereby denied; to which the said defendants except, and it is ordered that said exception
35 be entered, which is hereto done.

The defendants to maintain the issues on their part call Cyrel Wigmore, and being first duly sworn, he is examined and cross-examined; thereupon it is ordered that the trial herein be suspended until 1:30 p. m., and it is ordered that the Court do now stand at recess until 1:30 p. m.

Upon the reassembling of Court pursuant to recess the defendants offer in evidence two maps, which are admitted and marked respectively "Defendants' Exhibit No. 2" and "Defendants' Exhibit No. 3;" thereupon the defendants called W. E. Spaw and O. A. Resdon, who each being first duly sworn are examined and cross-examined; thereupon the defendants offer in evidence certain photographs, which are received and marked "Defendants' Exhibit 4 and 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17;" thereupon the defendants call William John Arthur, and being first duly sworn, he is examined and cross-examined; thereupon W. E. Spaw is recalled and he is examined and cross-examined; thereupon William A. Moore and John Farrell are called, and each being first duly sworn, is examined and cross-examined; and thereupon R. H. Forbes is called, and being first duly sworn, he is examined and cross-examined, thereupon the defendants offer in evidence two bulletins, which are admitted and marked respectively, "Defendants' Exhibit 18," and "Defendants' Exhibit 19;" thereupon Luther Green is called by the Court for identification of a certain "exhibit which is offered by the Court as similar to certain deposits observed by the Court in his view of the lands heretofore viewed by the Court;" which said exhibit is admitted and marked "Exhibit X;" thereupon the examination of the witness R. H. Forbes is continued;
36 thereupon the trial herein is ordered suspended until 7:30 p. m., and the Court thereupon took a recess until 7:30 p. m., and upon the reassembling of Court at 7:30 p. m., the trial herein is ordered to proceed; thereupon the defendants call E. M. Williams, George Frazier, I. N. Stevens, William Berry, George H. Caspar, J. E. Caspar, who each being first duly sworn, was examined and cross-examined, except the witness Frank G. Kepler, whose cross-examination was waived; thereupon the trial herein is ordered sus-

pended and continued until 9:00 o'clock a. m., Saturday, May 4th, 1907.

Be it remembered, that on to-wit, the 4th day of May, 1907, the same being one of the regular juridical days of the April, 1907, term of said Court, the following orders were made and entered, and proceedings had and recorded, inter alia, in said Court in said cause, which said orders and proceedings are in words and figures following, to-wit:

Trial Resumed.

1532.

W. A. GILLESPIE
vs.
THE ARIZONA COPPER COMPANY et als.

The plaintiff being present in person and by counsel, Messrs. Armstrong & Lewis, and the defendants by counsel, M. J. Egan, Esq., and Walter Bennett, Esq., the trial herein is ordered to proceed; thereupon the defendants call George A. Olney and H. W. Bishop, and they are examined and cross-examined; thereupon the defendants call Norman Carmichael, who being first duly sworn, is examined and cross-examined; thereupon R. H. Forbes and
37 W. A. Moore are recalled and they are examined and cross-examined; thereupon the defendants rest; thereupon the plaintiff in rebuttal calls J. J. Birdno, who being first duly sworn, is examined and cross-examined; thereupon R. J. Young is again called and he is examined and cross-examined; thereupon the plaintiff rests; thereupon the defendants rest; thereupon the defendants move the Court that the Court do view the premises of the defendants before the rendition of judgment herein, which said motion is by the Court denied; thereupon it appearing to the Court that additional time is needed for the submission of the case on briefs, it is hereby ordered that this case be and the same is hereby continued for the term.

It is ordered that the defendants herein serve counsel of the plaintiff herein with a copy of their brief on or before August 1st, 1907, and that the plaintiff's counsel serve defendants' counsel with copy of their brief in answer thereto, on or before September 1st, 1907, and that all briefs be on file in this case with the Clerk of the Court at a date not later than September 10th, 1907.

Be it remembered, that on to-wit, the 4th day of November, 1907, the same being one of the regular juridical days of the October, 1907, term of said Court, the following order was made and entered, inter alia, in said Court in said cause, which said order is in words and figures following, to-wit:

Argument of Counsel.

1532.

W. A. GILLESPIE
vs.
ARIZONA COPPER CO., LTD.

The plaintiff present by Armstrong & Lewis, his counsel,
38 and the defendant by M. J. Egan and Walter Bennett, its counsel, and the matter coming on to be heard upon the law and the evidence heretofore taken in this cause, said cause is argued at length by counsel for the defendant, and thereupon before hearing from the plaintiff the Court suspends the hearing herein until November 5, 1907.

Be it remembered, that on to-wit, the 5th day of November, 1907, the same being one of the regular juridical days of the October, 1907, term of said Court, the following orders were made and entered, inter alia, in said Court in said cause, which said orders are in words and figures following, to-wit:

Judgment.

1532.

W. A. GILLESPIE
vs.
THE ARIZONA COPPER CO., LTD.

The argument having been this day resumed, and the matter finally submitted to the Court for consideration and decision, and the Court being fully advised in the premises, the judgment of the Court is in favor of the plaintiff and against the defendant, and that the plaintiff be granted the injunctive relief prayed for in the complaint, the decree not to become operative until May 1, 1908, and that plaintiff recover his costs.

Motion for New Trial Overruled.

1532.

W. A. GILLESPIE
vs.
THE ARIZONA COPPER CO., LTD.

The motion for a new trial in the cause herein having been filed on this date, said motion is by counsel for the defendant pressed to ruling; whereupon the matter being submitted to the Court
39 for consideration and decision, it is by the Court ordered that said motion for a new trial be and the same is hereby overruled.

Notice of Appeal.

1532.

W. A. GILLESPIE
vs.
THE ARIZONA COPPER CO., LTD.

Now comes Walter Bennett, Esq., of counsel for the defendant herein and gives notice of appeal to the Supreme Court of the Territory of Arizona, and it is ordered that said notice be entered, which is hereto done.

(Title of Court and Cause.)

I, the undersigned, Clerk of the District Court of the Fifth Judicial District of Arizona Territory, in and for Graham County, do hereby certify the foregoing to be a true copy of the judgment entered in the above entitled action, and recorded in Judgment Book C of said court, at page 185; And I further certify that the foregoing papers hereto annexed constitute the Judgment Roll in said action.

Witness my hand and the seal of the District Court, this 6th day of January A. D., 1908.

[SEAL.] W. R. CHAMBERS, *Clerk.*

40 Here follows certificate of Clerk as to costs, copy of which is omitted by direction of attorneys for appellant.

Office of the Clerk of the District Court, Graham County.

SOLOMONSVILLE, ARIZONA, *Feb. 28th*, 1908.

I, W. R. Chambers, Clerk of the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Graham, do hereby certify that the above and foregoing contains the entire record, including the original papers (the Exhibits in the case being forwarded by Wells-Fargo Express), on file in this Court, and all minute orders in the case entitled, No. 1532, W. A. Gillespie vs. The Shannon Copper Company, The Arizona Copper Company and The Arizona Copper Company, Ltd., defendants (statement of facts and order in relation thereto being forwarded under separate cover).

Witness my hand and the seal of said District Court, this 28th day of February, A. D. 1908.

W. R. CHAMBERS,
Clerk of said Court.

41 And on the same day, to-wit: the sixteenth day of March, 1908, there was filed in the Clerk's office of said Court in said entitled cause a certain Bond on Appeal in words and figures following, to-wit:—

(Title of Court and Cause.)

Bond.

Know all men by these presents that we, The Arizona Copper Company, Limited, a corporation, as principals, and the United States Fidelity and Guaranty Company, a corporation, of Maryland, as surety, are held and firmly bound unto William Allen Gillespie in the penal sum of Five Hundred ($500.00) Dollars for which sum well and truly to be paid to the said William Allen Gillespie, we bind ourselves, our heirs, executors, administrators and assigns, jointly severally and firmly by these presents.

Sealed with our seals and dated this 13th day of November, 1907.

The condition of the above obligation is such that whereas on the 5th day of November 1907, the said William Allen Gillespie did recover a judgment in the above entitled cause against the above bounden, The Arizona Copper Company, Limited, for the
42 sum of $85.30 costs of said action, and by which said judgment the said Arizona Copper Company, Limited, its agents, servants and attorneys are perpetually enjoined and restrained from in any wise, or in any manner, depositing or suffering or permitting to be deposited, or suffering or permitting to flow into the waters of the Gila River, the San Francisco River, and Chase Creek, any slime, tailings or sediments, from which said judgment the Arizona Copper Company, Limited, has appealed to the Supreme Court of the Territory of Arizona, and whereas it has been stipulated and agreed between the said plaintiff and this defendant that the penalty in the appeal bond in this cause shall be the sum of Five Hundred ($500.00) Dollars.

Now therefore, if the said The Arizona Copper Company, Limited, shall prosecute its said appeal with effect and shall pay all costs which have accrued in the court below, or which may accrue in the appellate court, then this obligation to be void, otherwise to remain in full force and effect.

THE ARIZONA COPPER COMPANY, LIMITED,
By WALTER BENNETT, *Its Att'y in Fact.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By THOS. ARMSTRONG, JR.,
Its Att'y in Fact.
By E. GANZ, *Its Att'y in Fact.*

[Corporate Seal of United States Fidelity and Guaranty Company.]

43 Endorsed: Approved and filed, November 23rd, 1907. W. R. Chambers, Clerk.

TERRITORY OF ARIZONA,
County of Graham, ss:

I, W. R. Chambers, Clerk of the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Graham, do hereby certify that the foregoing is a full, true and correct copy of the original bond on appeal in a case entitled William Allen Gillespie vs. The Arizona Copper Company, Limited, et al., now on file in my office.

Witness my hand and affixed Seal this 29th day of November, A. D. 1907.

[SEAL.]

W. R. CHAMBERS,
Clerk of the Said Court.

And on the same day, to-wit: the sixteenth day of March, 1908, there was filed in the Clerk's office of said court in said entitled cause a certain Statement of Facts, Order relating to Plaintiff's Objections to Statement of Facts and Suggested Amendments, and Plaintiff's Statement of Objections to Statement of Facts and
44 Suggested Amendments thereto, copies of which are omitted by direction of attorneys for appellant.

And on the same day, to-wit: the sixteenth day of March, 1908, there was filed in the Clerk's office of said Court in said entitled cause Plaintiff's exhibits A, B, C, D, E, F; exhibit X, and Defendants' exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19, copies of which are omitted by direction of attorneys for appellant.

And on to-wit: the twenty-first day of March, 1908, came the appellant by its attorneys and filed in the clerk's office of said court in said entitled cause its certain Notice of Application for Order extending suspension of judgment of the District Court, copy of which is omitted by direction of attorneys for appellant.

And on to-wit: the twenty-sixth day of March, 1908, came the appellant by its attorneys and filed in the clerk's office of said court in said entitled cause its certain Petition for Suspension of
45 Judgment, copy of which is omitted by direction of attorneys for appellant.

And on to-wit: the twenty-seventh day of March, 1908, came the appellee by his attorneys and filed in the clerk's office of said court in said entitled cause a certain Affidavit in Resistance to Motion for Suspension of Decree, copy of which is omitted by direction of attorney for appellant.

And on the same day to-wit: the twenty-seventh day of March, 1908, being one of the regular juridical days of the January term of said court, 1908, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

On motion of Mr. Walter Bennett, attorney for appellant herein, it is ordered that the Petition for Suspension of Judgment be heard this afternoon at 2:30 o'clock.

And on the same day to-wit; the twenty-seventh day of March, 1908, being one of the regular juridical days of the January term of said court, 1908, the following other order was had and
46 entered of record in said cause in words and figures following, to-wit:

Title of Cause.

The Petition for Suspension of Judgment coming on at this time for hearing was argued by Mr. Walter Bennett for Appellant and by Mr. Thos. Armstrong, Jr., and Mr. E. W. Lewis for Appellee, and it appearing to this court that the District Court of Graham County, Arizona, by its judgment in this cause rendered on the 5th day of November, 1907, did order and adjudge that the defendant, The Arizona Copper Company, Limited, its agents, servants and attorneys, be perpetually enjoined and restrained from in any wise or in any manner depositing or suffering, or permitting to be deposited, or suffering or permitting to flow into the waters of the Gila River, or into the San Francisco River, or Chase Creek, in such manner that they may be carried into or enter into the waters of the Gila River, any slimes, slickings or tailings, and in order that the appellant herein might bring the record and judgment in said cause before this court and have the same reviewed by this court before the said judgment should go into operation and effect, did further order that the said judgment should become opera-
47 tive May 1st, A. D. 1908, and not prior thereto.

And it satisfactorily appearing to this court that the appellant in this cause has made diligent efforts to get this case before this court, and to have the record thereof reviewed by this court at the January 1908 term thereof, and that the said appellant has been unable to do so because of the failure and inability of the court reporter of said Graham County to transcribe his notes of the oral testimony taken in said cause.

And it further appearing to the court that since the commencement of this action in the District Court of Graham County, Arizona, the appellant, The Arizona Copper Company, Limited, has made diligent efforts to so operate its plant and its concentrating works as to largely decrease the amount of waste material from its works finding its way into the waters of said Gila River, and that the plaintiff will not suffer irreparable damage by a suspension of the operation of said judgment until this cause can be reviewed by this court, and that if the judgment of said Graham County District Court should become operative before this cause can be reviewed by this court, the appellant would suffer large financial damage, and a large number of persons and their dependents would be detrimentally and seriously affected thereby.

48 And it further appearing that it is proper and necessary to the doing of justice between the parties herein, and for the public interests to restrain and suspend the operation of said judgment until this appeal is finally determined by this court, or until further or otherwise ordered.

Now, therefore, it is hereby ordered that the prayer of the ap-

pellant's petition herein be, and the same is hereby granted and that the operation of the judgment of the District Court of Graham County, Arizona, in said cause be, and hereby is, arrested and suspended until this appeal is finally determined, or until the further order of this court.

It is further ordered that as a condition of the granting of this order, The Arizona Copper Company, Limited, the appellant herein, continue to use the same efforts and means to minimize the amount of its waste material finding its way into the Gila River as it is now using, and was being used at the time of the rendition of said judgment, and that in addition thereto that it execute a bond to the plaintiff and appellee herein in the sum of $20,000. conditioned for the payment to said appellee of all damages which he may suffer by reason of the suspension of the operation of the judgment
49 of the District Court of Graham County in this cause until the final determination of this cause by this court.

Done in open court at Phœnix, Arizona, this 27th day of March, 1908.

And on the same day to-wit: the twenty-seventh day of March, 1908, being one of the regular juridical days of the January term of said court, 1908, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

It is ordered by the court that this cause be submitted on briefs.

It is further ordered that the appellee herein be granted 30 days within which to file brief, and

It is further ordered that the appellant herein be granted 15 days thereafter within which to file reply brief.

And on to-wit: the seventeenth day of April, 1908, there was filed in the Clerk's office of said entitled court in said entitled cause a certain Order suspending judgment, in words and figures following, to-wit:

50 Title of Court and Cause.

Order Suspending Judgment.

It appearing to this court that the District Court of Graham County, Arizona, by its judgment in this cause rendered on the 5th day of November, 1907, did order and adjudge that the defendant, The Arizona Copper Company, Limited, its agents, servants and attorneys, be perpetually enjoined and restrained from in any wise or in any manner depositing or suffering, or permitting to be deposited, or suffering or permitting to flow into the waters of the Gila River, or into the San Francisco River, or Chase Creek, in such manner that they may be carried into or enter into the waters of the Gila River, any slimes, slickings or tailings, and in order that the appellant herein might bring the record and judgment in said cause

before this court and have the same reviewed by this court before the said judgment should go into operation and effect, did further order that the said judgment should become operative May 1st, A. D. 1908, and not prior thereto.

And it satisfactorily appearing to this court that the appellant in this cause has made diligent efforts to get this case before this court, and to have the record thereof reviewed by this court at the
51 January, 1908, term thereof, and that the said appellant has been unable to do so because of the failure and inability of the court reporter of said Graham County to transcribe his notes of the oral testimony taken in said cause.

And it further appearing to the court that since the commencement of this action in the District Court of Graham County, Arizona, the appellant, The Arizona Copper Company, Limited, has made diligent efforts to so operate its plant and its concentrating works as to largely decrease the amount of waste material from its works finding its way into the waters of said Gila River, and that the plaintiff will not suffer irreparable damage by a suspension of the operation of said judgment until this cause can be reviewed by this court, and that if the judgment of said Graham County District Court should become operative before this cause can be reviewed by this court, the appellant would suffer large financial damage, and a large number of persons and their dependents would be detrimentally and seriously affected thereby.

And it further appearing that it is proper and necessary to the doing of justice between the parties herein, and for the public
52 interests to restrain and suspend the operation of said judgment until this appeal is finally determined by this court, or until further or otherwise ordered.

Now, therefore, it is hereby ordered that the prayer of the appellant's petition herein be, and the same is hereby granted, and that the operation of the judgment of the District Court of Graham County, Arizona, in said cause be, and hereby is, arrested and suspended until this appeal is finally determined, or until the further order of this court.

It is further ordered that as a condition of the granting of this order, The Arizona Copper Company, Limited, the appellant herein, continue to use the same efforts and means to minimize the amount of its waste material finding its way into the Gila River as it is now using, and was being used at the time of the rendition of said judgment, and that in addition thereto that it execute a bond to the plaintiff and appellee herein in the sum of $20,000. conditioned for the payment to said appellee of all damages which he may suffer by reason of the suspension of the operation of the judgment of the District Court of Graham County in this cause until the final determination of this cause by this court.

53 Done in open court at Phoenix, Arizona, this 27th day of March, 1908.

By the Court,

EDWARD KENT,
Chief Justice.

And on to-wit: the twenty-eighth day of April, 1908, came the appellant by its attorneys and filed in the clerk's office of said Court in said entitled cause its certain Bond in words and figures following, to-wit:

Title of Court and Cause.

Know all men by these presents, That the Arizona Copper Company Limited, a corporation, as principal, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto William Allen Gillespie in the sum of Twenty Thousand ($20,000.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, the undersigned bind themselves, their legal representatives and assigns, jointly, severally and firmly by these presents.

Dated this 27th day of April, 1908.

The condition of the above obligation is such that

Whereas, on the 5th day of November, 1907, the District
54 Court of Graham County, Arizona, did enter a judgment in the above entitled cause by which said judgment it was ordered and decreed that the above named obligee, the Arizona Copper Company, Limited, its agents, servants and attorneys, be perpetually enjoined and restrained from in any wise or in any manner depositing or suffering or permitting to be deposited, or suffering to flow, into the waters of the Gila River, or into the San Francisco River, or into Chase Creek, in such manner that they may be carried into or enter into the waters of said Gila River, any slimes, slickings or tailings; the said judgment to become operative May 1st, 1908, and not prior thereto.. And,

Whereas: The said Arizona Copper Company, Limited, has appealed to the Supreme Court of the Territory of Arizona from said judgment and from the order of said District Court denying a new trial of said action, and,

Whereas: The said Arizona Copper Company Limited, has made application in this court for an order suspending the operation of said judgment pending said appeal, and

Whereas: On the 27th day of March, 1908, the said application was heard by this court, and this court did upon the hearing
55 of said application, enter an order in this cause granting the prayer of said application, and requiring as a condition of said order, that these presents be executed and delivered;

Now, therefore, if the said principal obligee herein, the Arizona Copper Company, Limited, shall prosecute its said appeal with effect, and shall pay to the said William Allen Gillespie all damages which he may suffer by reason of the judgment of this court entered as aforesaid, suspending the operation of said judgment of the District Court of Graham County, Arizona, until this cause shall be finally determined by this court, or until the further order of

this court, then this obligation to be void; otherwise to remain in full force and effect.

THE ARIZONA COPPER COMPANY, LIMITED,
By WALTER BENNETT, *Its Att'y.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By THOS. ARMSTRONG, JR., *Its Attorney in Fact.*
By E. GANZ, *Its Attorney in Fact.*

And on to-wit: the twelfth day of January, 1909, being one of the regular juridical days of the January term of said court,
56 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, on motion of Mr. Walter Bennett attorney for appellant herein, it is ordered that he be granted leave to submit additional authorities.

And on to-wit: the twentieth day of March, 1909, there was filed in the clerk's office of said court in said entitled cause, a certain Opinion in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1052.

THE ARIZONA COPPER COMPANY, LIMITED, Appellant,
versus
WILLIAM ALLEN GILLESPIE, Appellee.

Appeal from the District Court of Graham County; Before Honorable Frederick S. Nave, Judge.

Messrs. Walter Bennett and M. J. Egan for Appellant.
Messrs. Armstrong & Lewis, for Appellee.

This action was brought by the appellee against the Shan-
57 non Copper Company, The Arizona Copper Company, Limited, and The Arizona Copper Company, to obtain an injunction restraining the defendants from depositing mining debris in streams tributary to the Gila River. It appearing to the plaintiff that The Shannon Copper Company had ceased to do the acts complained of, and that The Arizona Copper Company was not a proper party, the action was dismissed as to both these corporations, and prosecuted against the appellant corporation only. Testimony was taken in May, and the cause submitted and judgment rendered in November, 1907, enjoining the defendant from depositing any slimes, slickens or tailings in the San Francisco River or Chase

Creek, in such manner that they may be carried into or enter into the waters of the Gila River. The facts found by the trial court are:

"That the Gila River rises in the Territory of New Mexico, and flows thence through a generally mountainous country through the County of Graham and other counties in the Territory of Arizona in a westerly direction, into the Colorado River at or near the City of Yuma, in the Territory of Arizona.

That the San Francisco River is an affluent of the said Gila River, emptying its waters into the said Gila River at or near the City of Clifton aforesaid, and above the head of the Montezuma and other canals hereinafter described.

That Chase Creek is an affluent of the said San Francisco River, emptying its waters into the said San Francisco River above the City of Clifton; that each and all of said streams are public streams within the said county of Graham, and the waters thereof are applicable to the purposes of mining, irrigation, and domestic use.

58 That the plaintiff is the owner and occupant of about 276 acres of land in the upper Gila Valley, near the town of Solomonsville, and that said land is naturally desert and unproductive without the application of water thereon by irrigation.

That the predecessors in interest of plaintiff in said land commenced the cultivation to valuable crops of portions of the same by means of water diverted from the Gila River through the Montezuma Canal about the year 1872, and thereafter gradually increased the amount thereof so cultivated until for more than fifteen years last past the whole of said premises has been continually cultivated to valuable crops by means of said waters of the Gila River.

That the said Montezuma Canal, by and through which plaintiff diverts the water appropriated for use upon said land as aforesaid, at all the times mentioned herein, headed and now heads at a point upon the bank of said Gila River at or near the southwest corner of the northeast quarter of the northeast quarter of Section 17, Township 7 South, Range 26 East, G. & S. R. B. & M., in said Graham County, at a distance of about 25 miles below the confluence of the said San Francisco River and said Gila River. That commencing at said head of the said Montezuma Canal and extending out into and across the said Gila River was at all the times mentioned herein, and now is, maintained a dam for the purpose of diverting the waters of said Gila River into said Canal. That said Montezuma Canal is of a capacity sufficient to, and does, divert and carry 3,000 inches of water, miner's measurement, from the said Gila River, and said canal extends out through the farming lands of the valley commonly known and called the Upper Gila Valley, a distance of 13½ miles, all within the said County of Graham. That said canal carries the public waters of said Gila River for the irrigation of more than 3,750 acres of land, to which said water was, and now is, appropriated, diverted, and applied by the owners and occupants thereof for agricultural purposes, and drinking and domestic uses in connection therewith, amongst others, to the lands of plaintiff. That said canal

and dam is maintained by the owners of said lands and plaintiff, for the purposes and uses aforesaid.

That in the said Upper Gila Valley and County of Graham, and from a point on said Gila River at or near eighteen miles below the confluence of said San Francisco and said Gila Rivers to a
59 points fifty-three miles below said last-named point, numerous irrigation ditches, amongst others said Montezuma Canal, were taken out of said Gila River at various times in and since the year 1872 by divers persons who were then, and are now, the owners and occupants of irrigable lands lying upon either side of said Gila River, and by means of said ditches the public waters of said river have been ever since appropriated, diverted and applied to the irrigation and cultivation of a constantly increasing quantity of irrigable lands so situated under said canals and occupied by persons entitled to the use of said waters, amongst others this plaintiff, until at the time of the institution of this suit more than twenty-three thousand acres of such lands were so irrigated and cultivated; and the said lands, theretofore desert and unproductive, were reclaimed and were made to, and do now, produce alfalfa, grains, vegetables, melons, fruits, trees, and vines; that at all the times herein mentioned, said ditches have been, and are now, maintained, and said public waters of said Gila River used upon the aforesaid land for the irrigation thereof, and the cultivation of valuable crops as aforesaid, and for domestic and drinking purposes in connection therewith. That as a result of the use of said public waters of said Gila River as aforesaid, a rich and prosperous farming community has been established upon the lands aforesaid, supporting the towns of Solomonsville, of Safford, of Thatcher, and others; in all a community of more than eight thousand persons.

That in the mountains through which the said Gila River and its affluents flow, in the neighborhood of the towns of Clifton, Morenci and Metcalf, within the County of Graham, are large deposits of copper ore, and that several large mining companies, including the defendant, The Arizona Copper Company, Limited, are engaged in the business of mining and reducing said ores; that mining operations on said deposits were commenced by miners about the year 1872 and have been continuously and increasingly prosecuted since that date, and that said mining industry and the farming industry in the Upper Gila Valley in which is situated the town of Solomonsville, were commenced about the same time and have each grown and increased in volume and importance to the present time. That the defendant, The Arizona Copper Company, Limited, is engaged in the reduction and treatment of copper ore in said mining district near the upper branches and affluents of the Gila River. That for the purpose of reducing and treating the said ores so
60 mined as aforesaid, said defendant has established upon the banks of said San Francisco River and said Chase Creek and upon the sides of the cañons debouching into said last-named streams, concentrators of a capacity sufficient to, and which now actually, reduce and treat more than three thousand tons of copper ore each day.

That it has invested a large amount of money in the development of said mining industry and in the installation and equipment of concentrators, smelting and reduction works used in the reduction of the products of said mines; and that the plants of this defendant company now used in said operations represent an investment of about fifteen million dollars. That defendant, in its mining, smelting and reduction of ores gives employment to about 3000 men and that a community of about 12,000 people are dependent for a livelihood upon the operations of the mining works of this defendant and of the other mining companies hereinbefore referred to.

That in the reduction of said copper ores by this defendant said ores are crushed and mixed with water, and that a portion of the slickens, slimes and tailings therefrom finds its way through the creeks, affluents and canals upon which the works of said defendant are situated, into the waters of the Gila River and becomes mingled therewith, and is carried by the waters of said Gila River down to the Upper Gila Valley in which the farming operations of the plaintiff are carried on, and by and through said river and irrigating ditches in the ordinary and necessary course of irrigation, to and upon the cultivated lands of plaintiff, and of others like situated.

That the Gila River is normally subject to periods of flood and of lower water recurrent several times during each year, due to recurrence of torrential rains alternating with periods without rain or with slow-falling rains; that during such periods of flood said river carries quantities of sedimentary matter, the product of erosion of the mountains, hills and valleys through which it and its tributaries flow; that this sedimentary matter contains organic fertilizers; that such matter is, at such periods of flood, carried through said irrigating canals in the normal and necessary course of irrigation, to and upon the lands of plainaiff and upon the cultivated lands of the valley, hereinbefore mentioned, and enhances their fertility, thereby in that respect benefiting
61 said lands; that at such periods of flood the proportion of slickens, slimes and tailings carried by the waters to the whole amount of sedimentary matter so carried is so small as to be negligible in determining the effects of the sedimentary matter upon the cultivated lands. That at the periods of lower water, the water of said river flowed clear and free from sediments prior to the time when such water began to carry slickens, slimes and tailings as herein described, and would continue so to flow clear and free from sediments, but for such slickens, slimes and tailings, and then did and now, but for such slimes, slickens and tailings, would continue to furnish clear water free from sediments to the various canals herein mentioned for the irrigation of the lands of plaintiff and of the other lands herein mentioned; that such clear water free from sediments is more valuable for the purposes of irrigation than water carrying sedimentary matter, whether of the natural products of erosion or of slimes, slickens or tailings; that in about the year 1885 the first concentrator was erected for the reduction of ores in con-

nection with the mining enterprises herein mentioned; that at a time which the Court cannot exactly determine, but some six to eight years before the institution of this action, the waters of the Gila River at other than flood periods, theretofore clear, became discolored by slime, slickens and tailings and began to deposit such slimes, slickens and tailings through the irrigating ditches herein mentioned in the normal and necessary course of irrigation upon the lands of plaintiff and other lands herein mentioned.

That since the last-mentioned time the quantity of such slimes, slickens and tailings carried by the said river and so deposited upon said lands of plaintiff and said other lands, continuously increased, until after the institution of this suit; that the said slimes, slickens and tailings so carried upon the said lands of plaintiff and the other said lands consist of finely pulverized rock; are inert; are chemically not injurious to the soil, or to plant life; add nothing of value to the farming lands of said valley for any purpose; are destitute of organic fertilizing material, but contain a small quantity of inorganic fertilizing material of a kind with which the soil of the said lands of plaintiff and other said lands, are, and at the times mentioned herein have been, adequately supplied; that all of said sedimentary matter carried upon said cultivated lands of plaintiff and other said lands, whether the products of erosion, or slimes, slickens and tailings, injuriously affects the said cultivated lands for the purpose of raising crops, in that it becomes deposited in constantly increasing depth on the surface of said cultivated lands, being deposited more heavily and to a greater depth near the points at which the water is immediately applied to said lands for the purpose of irrigation, and becoming progressively thinner as the water passes over the said lands farther from the points of immediate diversion and application; that said deposit of sedimentary matter is injurious to said lands for the purpose of raising crops in several respects: One, in that it elevates the land adjoining the point of immediate application of the said water, thus compelling the taking of the water supply from increasingly high water levels in order to flood the water upon said lands; a second, in that it forms a compact layer over the soil, not readily permeable by water, thus depriving the roots of the plants of the appropriate and necessary irrigation; and a third, in that it packs about the roots and stems of growing plants thus mechanically choking and burying them to the restriction of their growth and productiveness; that the second named injurious effect is remediable by deep plowing and harrowing, whereby sedimentary matter so deposited is mingled with the natural soil; that the most important crop grown by plaintiff and by the cultivators of the other cultivated lands herein referred to, both in the extent of land on which said crop is cultivated, and in the value, is of alfalfa, which is a perennial and cannot be plowed without its destruction; that alfalfa reaches its highest productivity at the age of three or four years, and continues at a maximum of productivity, for a lifetime of unascertained duration, in excess of fifteen years; that alfalfa stools at or near the surface of the soil, and that the productivity and thrifti-

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ness of the plant is seriously impaired, when the crown at which it so stools becomes covered; that said sedimentary deposits are peculiarly injurious to alfalfa by reasons of the fact that they bury the stooling crowns; that the injurious effect of such deposits upon alfalfa may be ameliorated but not obviated by deep harrowing; that the sedimentary deposit upon cultivated soil of slimes, slickens and tailings is more injurious than the natural sediment of erosion (to an extent which the Court cannot define in a percentage) by reason of the fact that the said slimes, slickens and tailings are much more finely pulverized than the natural sediment of erosion and form a more compact blanket, more nearly impermeable to
63 the passage of water, and when dry, much harder, more cement-like, and more difficult to plow, or harrow; that the said slimes, slickens and tailings are also more injurious to growing plants in their mechanical choking effect than the natural sediment of erosion by reason also of the more fine pulverization of the former and the more compact way in which they become packed on and about the roots and stems of such growing plants; that normally the periods of lower water in the said river come at the times when there is the greatest need of irrigation by growing crops; that for a period of a year or two prior to the institution of this suit the waters of the said river carried such a great volume of slimes, slickens and tailings that layers of such slimes, slickens and tailings, unmixed with other substances, were deposited in some of the irrigating ditches more directly affected thereby and on the soil near the points of immediate application of water therefrom for purposes of irrigation, of a thickness of half an inch or more; that the plaintiff was injured in the loss of the productivity of his fields of alfalfa upon his said lands in the year preceding the filing of this suit, by reason of the sedimentary deposits upon his fields of alfalfa, in an amount which the Court cannot exactly determine, in excess of one thousand ($1,000) dollars; that from the same cause the crops of alfalfa grown upon the other cultivated lands herein referred to during the said year were diminished to an amount and in a value which the Court cannot exactly determine, of many thousands of dollars.

The Court further finds that complaints of the effect of said slimes, slickens and tailings were first made by the plaintiff to the said defendant about five years ago, and that thereafter said defendant commenced and thereafter prosecuted the work of arresting the same from entering said Gila River, and that in doing so it has established large and expensive settling works and devised means of carrying off a large proportion of its waste products, and in its said efforts has expended approximately $50,000; that at the time of the trial of this cause about seventy-five per cent of the total waste products of defendant's works theretofore deposited in tributaries of said Gila River were, and now are, arrested, settled and otherwise disposed of, with such result that a large percentage, which the Court cannot determine from the evidence, but fixes as in excess of fifty

per cent, of the slimes, slickens and tailings theretofore flow-
64 ing from said works into said river, do not so flow. That prior to the institution of this suit the co-defendants of this defendant contributed from their reduction works a portion of the slimes, slickens and tailings then being carried by said river to and upon the lands of plaintiff and the other lands herein mentioned; that at the time of the trial of this cause said co-defendants had ceased and agreed to cease the flowing of such slimes, slickens and tailings into said river.

The Court further finds that during the last five years the agricultural lands of the Upper Gila Valley in the vicinity of Solomonville, including the lands of the plaintiffs, have greatly increased in market value and selling price, and that that portion of said lands which are set to alfalfa and are known as alfalfa lands have in the last five years increased in value and market price to the same extent as that portion of said lands adapted to and used in the production of cultivated crops.

That the injuries complained of in said complaint are continuous, and constantly increasing. That plaintiff has no adequate remedy at law for the redress of said injuries caused him by said defendant, in this, that the damages caused to plaintiff by the acts of defendant are of a nature not readily susceptible of proof in an action at law for damages, and that said injuries in their ultimate effect are irreparable. That the defendant threatens to, and will, unless restrained by the order of this Court, continue to deposit slimes, slickens and tailings as hereinbefore set forth, to the damage of plaintiff."

It appears that the defendant company operates three concentrating plants, one of which is located at the town of Morenci, one between Morenci and Clifton, and one at Clifton. At the time of the trial provision had been made whereby all of the slimes, slickens and tailings from the concentrators other than the one at Clif-
ton, were impounded and none allowed to go into the waters
65 of the Gila River. It also appears that owing to the topography of the country it is impossible to impound and restrain from going into the river the finer and lighter tailings or slimes from the concentrator at Clifton, and that compliance with the order of the court must result in closing down the concentrator at that point. The evidence does not disclose the capacity of that concentrator, nor the number of persons employed there. It further appears from uncontradicted testimony in the case that it is practicable to construct and maintain, at moderate expense, settling basins at or near the heads of the various irrigating canals, by means of which much of the sediment, including that from the defendant's concentrator, may be prevented from going into the irrigating canals.

CAMPBELL, *J.* (after stating facts):

It is insisted by the appellant that if any wrong is being done by permitting debris from its mining operations to go into the river, the acts constitute a public nuisance, and that the plaintiff may not maintain this action, because it does not appear that the injury sus-

tained by him differs in kind from that sustained by the general public.

The Supreme Court of the United States, our appellate
66 court, in the early case of Georgetown v. Alexandria Canal Co., 12 Peters, 91, after reviewing the authorities, say:

"The principle then is, that in case of a public nuisance where a bill is filed by a private person, asking for relief by way of prevention, the plaintiff cannot maintain a stand in a court of equity, unless he avers and proves some special injury."

In Mississippi and Missouri Railroad Company v. Ward, 2 Black, 485, it is said:

"A bill in equity to abate a public nuisance, filed by one who has sustained special damages, has succeeded to the former mode in England of an information in Chancery, prosecuted on behalf of the Crown, to abate or enjoin the nuisance as a preventive remedy. The private party sues rather as a public prosecutor than on his own account; and unless he shows that he has sustained, and is still sustaining, individual damage, he cannot be heard. He seeks redress of a continuing trespass and wrong against himself, and acts in behalf of all others, who are or may be injured."

The rule, as stated by many if not most of the courts of the states, is that to authorize a private citizen to maintain an action to abate a public nuisance, he must show a special injury, different in kind and not merely in degree, from that suffered by the public generally, and much difficulty has been found in determining when the injury differs in kind rather than in degree from that suffered by the public. This difficulty has led the Supreme Court of Minnesota to declare that,

"No general rule can be laid down which can be readily applied to every case. Where to draw the line between cases where
67 the injury is more general or more equally distributed and cases where it is not, where by reason of local situation the damage is comparatively much greater to the special few, is often a difficult task. In spite of all the refinements and distinctions which have been made, it is often a mere matter of degree, and the courts have to draw the line between the more immediate obstruction or peculiar interference, which is a ground for special damage, and the more remote obstruction or interference which is not". Kaje v. Railway Co., 57 Minn., 422; 59 N. W., 493.

One of the clearest statements, we think, of the distinction is to be found in Wesson v. Washburn Iron Company, 13 Allen (Mass.), 95, where it is said:

"The real distinction would seem to be this: that when the wrongful act is of itself a disturbance or obstruction only to the exercise of the common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals. In such case the act of itself does no wrong to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience or annoyance, for which an action might be maintained in favor of a person injured, it is

none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. This we think is substantially the conclusion to be derived from a careful examination of the adjudged cases. The apparent conflict between them can be reconciled on the ground that an injury to private property, or to the health and comfort of an individual, is in its nature special and peculiar, and does not cause a damage which can properly be said to be common or public, however numerous may be the cases of similar damages arising from the same cause."

Tested by these rules, we have no difficulty in concluding
68 that the plaintiff may maintain this action. By reason of the acts of the defendant he, with other owners of land irrigated by water from the Gila River, is suffering a direct individual injury, different from that of the general public. It is true that the general public also suffers an injury from the acts of the defendant, but only in the sense that whatever decreases the general prosperity of the community injures all who are members of the community. The injury of those so suffering is general and not special.

Appellant contends that the facts found by the court do not disclose that it is committing any wrong, for the reason that it is engaged in the conduct of a lawful business; that the right to use the waters of a public stream for mining purposes is recognized by law; that its rights in that respect are equal to those of the agriculturist to use the water for purposes of irrigation and that in depositing in the river only such of the slimes and tailings as is reasonably necessary in the successful operation of its business it is acting wholly within its rights. Riparian rights do not exist in this Territory. The laws of the Territory do recognize the right to appropriate the waters of public streams for mining purposes,
69 as well as for agriculture. No superior right, however, is accorded the miner. Under the doctrine of appropriation, he who is first in time is first in right, and so long as he continues to apply the water to a beneficial use, subsequent appropriators may not deprive him of the rights his appropriation gives, either by diminishing the quantity or deteriorating the quality. We do not mean to say that the agriculturist may captiously complain of a reasonable use of water by the miner up the stream, although it pollutes and makes the water slightly less desirable, nor that a court of equity should interfere with mining industries because they cause slight inconveniences or occasional annoyances, or even some degree of interference, so long as such do no substantial damage, but to permit a subsequent appropriator to so pollute or burden the stream with debris as substantially to render it less available to the prior appropriator causes him to lose the rights he gained by appropriation as readily as would the diversion of a portion of the water which he appropriated. The plaintiff, by his grantor, appropriated water for the purposes of irrigation in 1872, as did other agriculturists in the community, and, while it does not clearly appear when the de-

fendant first made use of water in connection with its operations, it does appear that it was not prior to 1885.

Counsel press upon us the proposition that we should consider the comparative damage that will be done by granting or withholding an injunction in this case, alleging that the effect of an injunction will be to stop the operation of extensive works, deprive thousands of persons of employment, and cause loss and distress to other thousands. It is undoubtedly true that a court should exercise great care and caution in acting where such results are to follow. It should very clearly appear that the acts of the defendant are wrongful and that the complainant is suffering substantial and irreparable injury, for which he cannot secure adequate compensation at law. A number of eminent courts support the contention of appellant, that the comparative injury to the parties in granting or withholding relief must also be considered. Among the cases so holding is McCarthy v. Bunker Hill and Sullivan Mining and Concentrating Company, 164 Fed., 927, decided by the Circuit Court of Appeals for this circuit, a court for which we entertain the highest respect and which exercises an appellate jurisdiction over this court in certain cases; and if this case were reviewable there, we should not feel at liberty to express views in conflict with those of that court. But this case is reviewable only by the Supreme Court of the United States, and we cannot find, as suggested by the Circuit Court of Appeals, that that court has given adherence to the doctrine. It seems to us that to withhold relief where irreparable injury is and will continue to be suffered by persons whose financial interest are small in comparison to those who wrong them, is inconsistent with the spirit of our jurisprudence. It is in effect saying to the wrong-doer, "if your financial interests are large enough so that to stop you will cause you great loss, you are at liberty to invade the rights of your smaller and less fortunate neighbors." We prefer the doctrine adhered to by Judge Hawley in his dissenting opinion in Mountain Copper Company v. United States, 142 Fed., 643, and by Judge Sawyer in Woodruff v. North Bloomfield Gravel Mining Company, 18 Fed., 753. In the latter case, it is said:

"Of course, great interests should not be overthrown on trifling or frivolous grounds, as where the maxim 'de minimis non curat lex' is applicable; but every substantial, material right of person or property is entitled to protection against all the world. It is by protecting the most humble in his small estate against the encroachments of large capital and large interests that the poor man is ultimately enabled to become a capitalist himself. If the smaller interest must yield to the larger, all small property rights, and all smaller and less important enterprises, industries, and pursuits, would sooner or later be obsorbed by the large, more powerful, few; and their development to a condition of great value and importance, both to the individual and the public, would be arrested in its incipiency."

To the same effect are the remarks of Judge Marshall in McCleery v. Highland Boy Gold Mining Company, 140 Fed., 951, wherein he says:

"The substantial contention of the defendant is that it is engaged in a business of such extent and involving such a large capital that the value of the plaintiff's rights sought to be protected is relatively small, and that therefore an injunction, destroying the defendant's business, would inflict a much greater injury on it than it would confer benefit upon the plaintiffs. Under such circumstances, it is asserted, courts of equity refuse to protect legal rights by injunction and remit the injured party to the partial relief to be obtained in actions at law. Stated in another way, the claim in effect is that one wrongfully invading the legal rights of his neighbor will be permitted by a court of equity to continue the wrong indefinitely on condition that he invest sufficient capital in the undertaking.

I am unable to accede to this statement of the law. If correct, the property of the poor is held by uncertain tenure, and the constitutional provisions forbidding the taking of property for private use would be of no avail. As a substitute it would be declared that private property is held on the condition that it may be taken by any person who can make a more profitable use of it, provided that such person shall be answerable in damage to the former owner for his injury. In a state of society the rights of the individual must to some extent be sacrificed to the rights of the social body; but this does not warrant the forcible taking of property from a man of small means to give it to the wealthy man, on the ground that the public will be indirectly advantaged by the greater activity of the capitalist. Public policy, I think, is more concerned in the protection of individual rights than in the profits to inure to individuals by the invasion of those rights."

See also Sullivan v. Jones and McLaughlin Steel Co., 208 Pa., 540; 57 Atl., 1065.

However, if we felt called upon to undertake the task
73 of comparing the injury that must result to the two communities, we are not certain that the comparison would result favorably to the appellant. While the testimony shows, and the trial court found, that the appellant has invested about fifteen million dollars and gives employment to about three thousand men, and that many others are dependent upon the operation of its properties, the testimony also discloses that but one of its three concentrators will be affected by the injunction; that the slimes and tailings from the others are impounded and do not find their way into the river; and it is not shown just what hardship will result to the corporation or community from the closing of this concentrator. Upon the other hand, the one principal industry of the upper Gila Valley, alfalfa raising, will suffer great injury and possible destruction if the injunction be refused. The destruction of that industry, or even serious injury to it, will in a measure bring disaster to a large and prosperous community. In our opinion a court should exercise great care, but should not refuse relief where the injury is substantial and the right clear.

One of the witnesses who testified on behalf of the defendant was

Professor R. H. Forbes, director and chemist of the Agri-
74 cultural Experiment Station at the University of Arizona. Both plaintiff and defendant put in evidence a bulletin prepared by Professor Forbes and issued by the University of Arizona, in which are set forth the observations and conclusions of the writer as to the effects of the sediments of the Gila River and of the mining detritus, such as comes from appellant's concentrators, upon the agricultural lands of the upper Gila Valley. Appellant now complains that some of the conclusions reached by Professor Forbes are not warranted by the facts which he observed and recorded. We have given the matter attention, but to review the testimony here would unduly extend this opinion. It seems sufficient to say that in our opinion the testimony of Professor Forbes, together with that of the farmers, fully sustains the findings of fact made by the trial court.

It would seem from the testimony of Professor Forbes that it is practicable, at comparatively small expense, to construct settling basins at or near the heads of the canals, or elsewhere along the river, by means of which the tailings and slimes carried by the Gila river from appellant's concentrator may be arrested and prevented from being deposited upon the farming lands. We do not agree with appellant that the farmers should be required to construct
75 and maintain such basins, but we see no reason why, if such basins will afford relief, appellee should not be permitted to construct and maintain them at its own expense. This suggestion does not appear to have been presented to the trial court and its decree is so drawn that such means of relief may not be availed of since appellant is enjoined from permitting any of tailings or slimes to reach the waters of the Gila river. We think, to enable the mining company to take advantage of any efforts it may make in this direction, it should be left to the discretion of the trial court hereafter upon a proper showing made to it temporarily to modify the injunction so as to permit of reasonable experiments being made to ascertain the probability of successfully erecting and maintaining settling basins to effectually dispose of the tailings and slimes without detriment to the lands lying under the canals, and with authority in the District Court likewise permanently to enforce or modify the injunction in accordance with the conditions as they shall be found to be.

The decree of the district court is modified as indicated, and as modified, is affirmed.

JOHN H. CAMPBELL, *A. J.*

We concur:
EDWARD KENT, *C. J.*
RICHARD E. SLOAN, *A. J.*
FLETCHER M. DOAN, *A. J.*

76 And on the same day to-wit: the twentieth day of March, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order and judgment was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court be modified as indicated in the opinion rendered herein, to which reference is hereby made, and as so modified, be, and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that appellee herein do have and recover of and from the Arizona Copper Company, Limited, appellant herein, and the United States Fidelity and Guaranty Company, a corporation, of Maryland, sureties on appeal bond herein, his costs in this court, taxed at forty-eight and 35/100 dollars, together with his costs in the court below in this cause
77 incurred.

And on to-wit: the thirty-first day of March, 1909, came the appellant by *his* attorneys and filed in the clerk's office of said court in said entitled cause *his* certain Motion for Rehearing in words and figures following, to-wit:

Title of Court and Cause.

Petition for Rehearing.

Comes now The Arizona Copper Company, Limited, appellant in the above entitled cause, by M. J. Egan and Walter Bennett, its attorneys, and moves this court to grant a rehearing herein; and as grounds for said motion shows to the court—

First. That the court failed to consider the fact demonstrated from the testimony of Professor Forbes and uncontradicted by any other evidence, that the deleterious effects of the sedimentation of the alfalfa fields is exactly proportioned to the amount of natural sediment carried by the waters of the river from which the fields are irrigated without reference to mining debris carried in suspension therein. This is demonstrated by the fact that a proportional deleterious effect was observed and recorded by Professor Forbes in the alfalfa fields irrigated with water from the Salt and Colorado Rivers containing no tailings or other mining debris.

Second. The Court failed to consider the fact undisputed
78 by the evidence and found by the trial court that more than seventy-five per cent. of the tailings from the defendant's works which were being cast into the river at the time the action was commenced, and to which time all the evidence regarding their deleterious effect was referred, were at the time of the trial, and now are being kept out of the river by the defendant.

Third. The court failed to consider the fact, demonstrated by the evidence and found by the trial court, that all sediments carried by the irrigating water onto the fields are detrimental to the alfalfa crops, and that large quantities of natural sediments are carried onto

the lands by the irrigation thereof with the waters of the Gila River, and the further fact demonstrated by the evidence and undisputed, that at the time of the hearing of this cause less than one four-hundredth part of the sediment so carried upon the lands was mining tailings and of that one four-hundredth part only a portion was contributed by the operations of this defendant, and that therefore the shutting down of defendant's works would not appreciably affect the sedimentation and consequent injury to plaintiff's crops.

Fourth. The court failed to consider that the placing upon the defendant the burden of the construction of "settling basins
79 at or near the heads of the canals or elsewhere along the river", for the purpose of settling the sediment and tailings out of the water of the river and thereby clarifying it for the use of the irrigationists, is to place upon the defendant the necessity of freeing the waters of the river of sedimentation only one four-hundredth part of which is contributed by all the mining companies and only a portion of which one four-hundredth part is contributed by this defendant.

Fifth. The court failed to consider the fact proven by the uncontradicted evidence and found by the court that notwithstanding the alleged injury to the agricultural lands of the Gila Valley, those lands have within the last five years "greatly increased in market value and selling price, and that that portion of said lands known as alfalfa lands have in the last five years increased in market value and selling price to the same extent as that portion of said lands adapted to and used in the production of cultivated crops", and the court failed to consider the inconsistency of such increase of value with the alleged injury to the lands in question by the operations of the defendant.

Sixth. That the court failed to consider the effect of the
80 finding of the trial court that "at periods of flood the proportion of sli-kens, slime and tailings carried by the waters to the whole amount of sedimentary matter so carried is so small as to be negligible in determining the effects of the sedimentary matter upon the cultivated lands" as bearing upon the question of the modification of the injunction so as to permit the appellant to flow its tailings into the river during such flood periods, when as so found they could do no appreciable damage, and that such a modification could not injure appellant and would enable appellee to operate its concentrating works during a large part of the year.

Seventh. The court failed to consider that the judgment of the trial court in this case enjoins the appellee from "depositing or suffering or permitting to be deposited, or suffering or permitting to flow into the waters of the said Gila River, or into said San Francisco River, or said Chase Creek in such manner that they may be carried into or enter into the waters of the Gila River, any slimes, slickens or tailings." That this injunction is not limited to such slimes, slickens and tailings as are carried in suspension in the waters of the Gila River to the point where the appellee diverts water from said river for the irrigation of his lands, and prohibits the
81 use of the river and for the depositing of any waste material

from defendant's works, whether such waste material would reach the agriculturalists or not.

M. J. EGAN AND
WALTER BENNETT,
Attorneys for Appellant.

And on to-wit: the thirteenth day of April, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellant, be submitted.

And on to-wit: the first day of May, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellant and heretofore submitted,
82 be continued until the next session of the court, November 8, 1909, and injunction suspended during that period.

And on to-wit: the ninth day of November, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellant and heretofore submitted and continued, be continued until the January term of court, 1910.

And on the same day to-wit: the ninth day of November, 1909, being one of the regular juridical days of the January term of said court, 1909, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

At this day it is ordered by the Court that appellee herein be granted leave to file Statement resisting further suspension of injunction.

83 And on to-wit: the tenth day of November, 1909, came the appellee by his attorneys and filed in the clerk's office of said court in said entitled cause his certain Statement resisting further suspension of injunction, copy of which is omitted by direction of attorneys for appellant.

And on to-wit: the tenth day of January, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellant and heretofore submitted, be and the same is hereby denied.

And on the same day to-wit: the tenth day of January, 1910, being one of the regular juridical days of the January term of said court, 1910, the following other order was had and entered of record in said cause in words and figures following, to-wit:

84 Title of Cause.

At this day comes Mr. Walter Bennett for appellant herein, in open court, and gives notice of appeal to the Supreme Court of the United States, from the judgment of this Court.

And on to-wit: the twenty-second day of January, 1910, came the appellant by their attorneys and filed in the clerk's office of said Court in said entitled cause its certain Petition for Allowance of appeal, in words and figures following, to-wit:

Title of Court and Cause.

The defendant, The Arizona Copper Company, Limited, a corporation, conceiving itself aggrieved by the order of the Supreme Court of Arizona entered on the 30th day of March, 1909, affirming the judgment of the District Court of Graham County, Arizona, in the above entitled cause, and the further order of the Supreme Court of the Territory of Arizona in said cause denying the motion of the above named defendant for a rehearing of said cause entered on the 10th day of January, 1910, does hereby appeal from the said orders and judgment of said Supreme Court of the Territory of Arizona in said cause to the Supreme Court of the United States, and
85 does hereby pray that said appeal be allowed and that a citation be duly signed and issued, and that a transcript of the record, proceedings, opinion, orders and evidence in the case, duly authenticated, may be transmitted to the Supreme Court of the United States.

THE ARIZONA COPPER COMPANY, LIMITED,
By KIBBEY, BENNETT & BENNETT, &
M. J. EGAN,
Its Attorneys.

And on the same day to-wit: the twenty-second day of January, 1910, came the appellant by its attorneys and filed in the clerk's office of said court in said entitled cause, its certain application for Supersedeas, in words and figures following, to-wit:

Title of Court and Cause.

Comes now the Arizona Copper Company, Limited and asks this court to suspend the injunction granted in this action during the pendency of the appeal of this cause to the Supreme Court of the United States upon such terms as to bond or otherwise as it may consider proper for the security of the rights of the appellee. And it presents, herewith, affidavits of the facts and circumstances
86 relating to the same.

KIBBEY, BENNETT & BENNETT, &
M. J. EGAN,
Attorneys for Appellant.

And on the same day to-wit: the twenty-second day of January, 1910, there was filed in the Clerk's office of said court in said entitled cause certain Affidavits of Paul Heisinger, Norman Carmichael, and Lamar Cobb, copies of which are omitted by direction of attorneys for appellant.

And on the same day to-wit: the twenty-second day of January, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, comes Mr. Walter Bennett, attorney for appellant herein, in open court, and gives notice of appeal to the Supreme Court of the United States from the judgment of this Court and the order denying the Motion for Rehearing, and asks the Court to suspend the injunction granted in this action during the pendency of the appeal of this cause to the Supreme Court of the United
87 States upon such terms as to bond or otherwise as it may consider proper for the security of the rights of the appellee.

Upon motion of Mr. Thos. Armstrong Jr., attorney for appellee herein, it is ordered by the Court that he be granted time to oppose suspension of the injunction, and cause continued until two o'clock this afternoon.

And on the same day to-wit: the twenty-second day of January, 1910, being one of the regular juridical days of the January term of said court, 1910, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

The matter of the suspension of the injunction granted in this cause coming on at this time for hearing was argued by Mr. Jos.

H. Kibbey for appellant for the suspension of the injunction, and by Mr. Thos. Armstrong, Jr., for appellee, in opposition thereto, and the matter then taken under advisement by the Court.

On motion of Mr. Thos. Armstrong, Jr., it is ordered by the Court that he be granted until February 12th, 1910, in which to file affidavits, and

88 It is further ordered that appellant herein be granted five days thereafter within which to reply.

And on to-wit: the twenty-seventh day of January, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Affidavit of Norman Carmichael, copy of which is omitted by direction of attorneys for appellant.

And on to-wit: the fifteenth day of February 1910, came the appellant by its attorneys and filed in the clerk's office of said Court in said entitled cause its certain report of J. B. Girand, a Civil and Mining Engineer, and Maps "A" and "B" being maps of Morenci Canon Tailings Dams, and Tailings Dams in Hill's Addition to Clifton, of The Arizona Copper Company, copies of which are omitted by direction of attorneys for appellant.

And on the same day to-wit: the fifteenth day of February, 1910, came the appellee by his attorneys and filed in the clerk's office of said Court in said entitled cause certain Affidavits used in opposition to application for Supersedeas, copies of which are omitted by direction of attorneys for appellant.

89 And on to-wit: the nineteenth day of February 1910, there was filed in the clerk's office of said court in said entitled cause a certain Order suspending injunction, in words and figures following to-wit:

Title of Court and Cause.

The appellant, the Arizona Copper Company, Limited, being represented by Mr. M. J. Egan and Kibbey, Bennett & Bennett, and the appellee being represented by Thomas Armstrong, Jr.

Before the Honorable Edward Kent, Chief Justice of the Supreme Court of the Territory of Arizona:

The above named, the Arizona Copper Company, Limited, a corporation, having prayed an appeal to the Supreme Court of the United States from the decision, order and judgment of the Supreme Court of the Territory of Arizona rendered in the above entitled cause on the 20th day of March, 1909, whereby said Supreme Court modified and affirmed the decision, order, judgment and decree of the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Graham, in said cause, entered in said District Court on the 5th day of November, 1907, whereby it was "ordered, adjudged and decreed that the de-

fendant, The Arizona Copper Company, Limited, its agents,
90 servants and attorneys are hereby perpetually enjoined and restrained from in any wise or in any manner depositing or suffering, or permitting to be deposited, or suffering or permitting to flow into the waters of the said Gila River or into said San Francisco River or said Chase Creek in such manner that they may be carried into or enter into the waters of said Gila River, any slimes, slickens or tailings; this judgment to become operative May First, A. D., 1908, and not prior thereto; and that the said plaintiff do have and recover of said defendant, The Arizona Copper Company, Limited, the sum of $85.30, his costs and disbursements incurred herein;" and it having been shown that the matter in dispute in this cause exceeds the sum of Five Thousand Dollars ($5000), exclusive of interest and costs. It is ordered that the said appeal be and the same hereby is allowed.

And it having by the said appellant been made to appear that since the commencement of this action the said appellant has designed and constructed and put into operation large and expensive settling basins and other means and devices designed and intended to arrest, settle and dispose of the slimes, slickens and tailings from its concentrating and reduction works, and by said means has succeeded in arresting and impounding and disposing of the
91 major portion of the slimes, tailings and debris from its said works, and is at the present time in good faith operating said impounding works, and has agreed to and is proceeding to provide, install and operate other and further means and devices to arrest, impound and dispose of the said slimes, tailings and other debris from its said works:

It is therefore ordered that the operation of said injunction be suspended during the pendency of said appeal, so long as, and upon the condition that the appellant, The Arizona Copper Comapny, Limited, shall in good faith continue to operate and keep in repair the works, plans and devices already designed and put in operation by it to impound and otherwise dispose of the debris from its concentrating and reduction works above mentioned, and shall diligently and in good faith, and as soon as the machinery and other appliances therefor can be obtained, proceed to install and operate such other and further means and devices as are necessary to keep so far as practicably possible the debris from its said works from flowing into the waters of the said Gila River, Chase Creek or the San Francisco River.

And upon the further condition that the said appellant
92 execute an appeal bond in this cause in the sum of Twenty Thousand Dollars ($20,000), conditioned that the said appellant shall prosecute its said appeal to effect and shall answer all damages and costs if it shall fail to make its plea good, and that it shall pay to the said William Allen Gillespie all damages which he may sustain by reason of the suspension of the injunction in this cause.

And for the purpose of keeping this Court advised of the compliance in good faith by the appellant, The Arizona Copper Company,

Limited, with the terms and conditions of this order, Richard Layton is appointed as officer of this Court to inspect the said settling and impounding works of the said appellant and from time to time to report to this Court the condition of such works and the manner and efficiency of their operation, and for such purpose the said officer shall at all times have free access to all of said impounding and restraining works and to every part thereof. Said officer shall be allowed a compensation of One Hundred and Fifty Dollars ($150) per month, commencing March 1, 1910, which sum shall be paid by the said appellant to the Clerk of this Court on the first day of each month for the use of said officer.

This order as to the suspension of said injunction is made
93 subject to revocation or modification by this Court upon a proper showing that its terms and conditions are not being in good faith complied with.

Done at Phœnix, the Capital, this 19th day of February, 1910.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

And on to-wit: the second day of March, 1910, came the appellant by its attorneys and filed in the clerk's office of said court in said entitled cause its certain Appeal and Supersedeas Bond, in words and figures following, to-wit:—

Title of Court and Cause.

Know all men by these presents: That we, The Arizona Copper Company, Limited, a corporation, as principal, and the American Surety Company of New York, as surety, are held and firmly bound unto William Allen Gillespie, in the penal sum of Twenty Thousand ($20,000.00) Dollars, for which sum well and truly to be paid unto the said William Allen Gillespie we bind ourselves, our successors and assigns jointly, severally and firmly by these presents.

Sealed with our seals and dated this 26th day of February,
94 1910.

The condition of the above obligation is such that,

Whereas, on the 20th day of March, 1909, the Supreme Court of the Territory of Arizona, by its order and judgment of that date, did modify, and as so modified, did affirm the judgment, order and decree of the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Graham, rendered in said cause on the 5th day of November, 1907, by which said judgment and decree the said Arizona Copper Company, Limited, a corporation, was adjudged to pay to the said William Allen Gillespie the sum of Eighty-five and Thirty-One-hundredths ($85.30) Dollars costs of said action, and by said judgment and decree the said The Arizona Copper Company, Limited, its agents, servants and attorneys are perpetually enjoined and restrained from in anywise, or in any manner depositing or suffering, or permitting to be deposited, or suffering or permitting to flow into the waters of the Gila River,

or into the San Francisco River or Chase Creek, in such manner that they may be carried into or enter into the waters of the Gila River, any slimes, slickens or tailings; and

Whereas, The said The Arizona Copper Company, Lim-
95 ited, has prayed an appeal from said judgment, order and decree of the Supreme Court of the Territory of Arizona to the Supreme Court of the United States, and for a suspension of the said injunction pending said appeal; and

Whereas, An order has been duly entered in said Supreme Court of the Territory of Arizona by Honorable Edward Kent, Chief Justice of said Court, allowing said appeal; and

Whereas, It is further ordered by said court that the said injunction be suspended pending said appeal upon the condition, among others, that the said appellant enter into a bond to the said William Allen Gillespie in the penal sum of Twenty Thousand ($20,000.00) Dollars, conditioned as provided in said order.

Now therefore, If the said The Arizona Copper Company, Limited, shall prosecute its said appeal to effect and shall answer all damages and costs, if it fails to make its plea good, and shall pay to the said William Allen Gillespie all damages which he may sustain by reason of the suspension of the injunction in this cause, then this obligation to be void; otherwise to remain in full force and virtue.

THE ARIZONA COPPER CO., LTD.
NORMAN CARMICHAEL,
General Manager.

96 AMERICAN SURETY COMPANY OF NEW YORK,

[SEAL.] By W. K. JAMES,
Resident Vice-President,

By C. F. AINSWORTH,
Resident Assistant Sec'y.

Approved & accepted both as to form & sufficiency of surety.

THOS. ARMSTRONG, JR.,
Att'y for Appellee.

Approved:

EDWARD KENT,
Chief Justice.

Approved:

F. A. TRITLE, JR., *Clerk.*

And on to-wit: the tenth day of March, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Report of the Inspector of the settling and impounding works of appellant, in words and figures following, to-wit:

THATCHER, ARIZ., *March* 7, 1910.

Hon. Edward Kent.

DEAR SIR: I have just returned from Clifton and have inspected the Arizona Copper Co.'s works. I found their impounding
97 tanks at Clifton and the dam in Morenci Canyon, in much better shape than when I was there in January.

They are going to work now like they meant business.

Mr. Carmichael informs me that his machinery is ordered and on the road. It will be installed as soon as they can do it. So they can take care of the red oxides that are coming in at Clifton. They have their box completed across Morenci Canyon, which makes it much easier to handle their tailings.

R. G. LAYTON.

And on to-wit: the eighteenth day of April, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Report of the Inspector of the settling and impounding works of appellant, in words and figures following, to-wit:

THATCHER, ARIZONA, *April* 1, 1910.

Hon. Judge Kent.

DEAR SIR: As regards to the slimes from the A. C. Co. works, will say, that they have the Morenci Canyon in very good condition, so that they are taking care of every thing.

At Clifton the settling tanks are in fairly good condition. But the red oxides are still flowing into the river. They are
98 working and experimenting, trying to put a machine in that will handle it.

They are working at it all the time, have not yet perfected it. They have their pipe there ready to lay, which will convey this to their settling tanks. Their large pump has been ordered but not shipped yet. It will be a month probably before it reaches here.

I think they are trying to do about the right thing under the circumstances.

I will keep you informed as conditions develop.

Yours truly,

R. G. LAYTON.

And on to-wit: the fourth day of May, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Report of the Inspector of the settling and impounding works of appellant, in words and figures following, to-wit:

THATCHER, ARIZONA, *May* 2, 1910.

Hon. Edward Kent.

DEAR SIR: There is not much change in the tailings proposition, only that the people on Hill's Flat near by where they are impounding the tailings from the Clifton Concentrator, have been
99 preventing the Company from laying their pipe until they will build them a wall to protect their property. This trouble is now all settled and they will commence to lay their pipe right away.

Things are looking pretty well.

Yours truly,

R. G. LAYTON.

And on to-wit: the thirty-first day of May, 1910, came the appellants by their attorneys and filed in the clerk's office of said court in said entitled cause its certain Assignment of Errors, in words and figures following, to-wit:—

Title of Court and Cause.

That Arizona Copper Company, Limited, the appellant in the above entitled cause, assigns for error the following rulings, orders and decrees in said cause, viz:

I.

The Supreme Court of the Territory of Arizona erred in affirming the judgment and order of the District Court of the Third Judicial District of the Territory of Arizona denying the motion of the Arizona Copper Company, Limited, to strike from the plaintiff's complaint that portion thereof pointed out and designated in said motion.

100

II.

The Supreme Court of the Territory of Arizona erred in affirming the judgment and order of the District Court of the Third Judicial District of the Territory of Arizona overruling the demurrer of the defendant, The Arizona Copper Company, Limited, to the plaintiff's complaint.

III.

The Supreme Court of the Territory of Arizona erred in affirming the judgment and decree of the District Court of the Third Judicial District of the Territory of Arizona adjudging and decreeing as follows:

"That the defendant, The Arizona Copper Company, Limited, its agents, servants and attorneys are hereby perpetually enjoined and restrained from in anywise or in any manner depositing, or suffering or permitting to be deposited, or suffering or permitting to flow into the waters of said Gila River, or into said San Francisco River or said Chase Creek, in such manner that they may be carried into or enter into the waters of said Gila River, any slimes, slickens, or tailings."

IV.

The Supreme Court of the Territory of Arizona erred in refusing to reverse the final judgment and decree of the District Court of the Third Judicial District of the Territory of Arizona.

Wherefore the said Arizona Copper Company, Limited, prays that the said Order and Decree of the Supreme Court of the Terri-
101 tory of Arizona affirming the said judgment and decree of the District Court of the Third Judicial District of the Territory of Arizona be reversed, and that this cause be remanded to

the Supreme Court of the Territory of Arizona with directions to reverse the decision and decree of the lower court in said cause.

KIBBEY, BENNETT & BENNETT &
M. J. EGAN,
Attorneys for Appellant.

And on to-wit: the second day of June, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Statement of Facts in words and figures following, to-wit:—

Title of Court and Cause.

The defendant, The Arizona Copper Company, Limited, having prayed an appeal from the judgment and decision of this Court heretofore during the January Term, 1909, thereof rendered and made in this cause, and said appeal having been allowed, and said defendant having also prayed that this court make and certify a finding and statement of facts in this cause to be transmitted and used on said appeal, this court does hereby make and certify
102 the following statement of facts herein, being the facts found by the Trial Court, except as modified herein, viz:

I.

That plaintiff is now, and at all the times hereinafter mentioned has been, a resident of the County of Graham and Territory of Arizona. That the defendant, The Arizona Copper Company, Limited, is a corporation organized and existing under and by virtue of the laws of the Territory of Arizona, with its principal office and place of business at the City of Clifton, County of Graham, and Territory of Arizona.

II.

That the Gila River rises in the Territory of New Mexico, and flows thence through a generally mountainous country through the County of Graham and other counties in the Territory of Arizona in a westerly direction, into the Colorado River at or near the City of Yuma, in the Territory of Arizona.

That the San Francisco River is an affluent of the said Gila River, emptying its waters into said Gila River at or near the City of Clifton aforesaid, and above the head of the Montezuma and other canals hereinafter described.

That Chase Creek is an affluent of the said San Francisco River, emptying its waters into the said San Francisco River above the City of Clifton; that each and all of said streams are public
103 streams within the said County of Graham, and the waters thereof are applicable to the purpose of mining, irrigation, and domestic use.

III.

That the plaintiff is the owner and occupant of about 276 acres of land in the upper Gila Valley, near the town of Solomonsville,

and that said land is naturally desert and unproductive without the application of water thereon by irrigation.

That the predecesors in interest of plaintiff in said land commenced the cultivation to valuable crops of portions of the same by means of water diverted from the Gila River through the Montezuma Canal about the year 1872, and thereafter gradually increased the amount thereof so cultivated until for more than fifteen years last past the whole of said premises has been continually cultivated to valuable crops by means of said waters of the Gila River.

IV.

That the said Montezuma Canal, by and through which plaintiff diverts the water appropriated for use upon said land as aforesaid, at all the times mentioned herein, headed and now heads at a point upon the bank of said Gila River at or near the southwest
104 corner of the northeast quarter of the northeast quarter of Section 17, Township 7 South, Range 26 East, G. & S. R. B. & M., in said Graham County, at a distance of about 25 miles below the confluence of the said San Francisco River and said Gila River. That commencing at said head of the said Montezuma Canal and extending out into and across the said Gila River was at all the times mentioned herein, and now is, maintained a dam for the purpose of diverting the waters of said Gila River into said canal. That said Montezuma Canal is of a capacity sufficient to, and does, divert and carry 3,000 inches of water, miners' measurement, from the said Gila River, and said canal extends out through the farming lands of the valley commonly known and called the Upper Gila Valley, a distance of 13½ miles, all within the said County of Graham. That said canal carries the public waters of said Gila River for the irrigation of more than 3,750 acres of land, to which said water was, and now is, appropriated, diverted, and applied by the owners and occupants thereof for agricultural purposes, and drinking and domestic uses in connection therewith, amongst others, to the lands of plaintiff. That said canal and dam is maintained by the owners of said lands and plaintiff, for the purposes and uses aforesaid.

105 V.

That in the said Upper Gila Valley and County of Graham, and from a point on said Gila River at or near eighteen miles below the confluence of said San Francisco and said Gila Rivers to a point fifty-three miles below said last-named point, numerous irrigation ditches, amongst others said Montezuma Canal, were taken out of said Gila River at various times in and since the year 1872 by divers persons who were then, and are now, the owners and occupants of irrigable lands lying upon either side of said Gila River, and by means of said ditches the public waters of said river have been ever since appropriated, diverted and applied to the irrigation and cultivation of a constantly increasing quantity or irrigable lands so situated under said canals and occupied by persons entitled to

the use of said waters, amongst others this plaintiff, until at the time of the institution of this suit more than twenty-three thousand acres of such lands were so irrigated and cultivated; and the said lands, theretofore desert and unproductive, were reclaimed and were made to, and do now, produce alfalfa, grains, vegetables, melons, fruits, trees, and vines; that at all the times herein mentioned, said ditches have been, and are now, maintained, and said public waters of said Gila River used upon the aforesaid land for the irriga-
106 tion thereof, and the cultivation of valuable crops as aforesaid, and for domestic and drinking purposes in connection therewith. That as a result of the use of said public waters of said Gila River as aforesaid, a rich and prosperous farming community has been established upon the lands aforesaid, supporting the towns of Solomonsville, of Safford, of Thatcher, and others; in all a community of more than eight thousand persons.

VI.

That in the mountains through which the said Gila River and its affluents flow, in the neighborhood of the towns of Clifton, Morenci and Metcalf, within the County of Graham, are large deposits of copper ore, and that several large mining companies, including the defendant, the Arizona Copper Company, Limited, are engaged in the business of mining and reducing said ores; that mining operations on said deposits were commenced by miners about the year 1872 and have been continuously and increasingly prosecuted since that date, and that said mining industry and the farming industry in the Upper Gila Valley in which is situated the town of Solomonsville, were commenced about the same time and have each grown and increased in volume and importance to the present time. That the defendant, The Arizona Copper Company, Limited, and
107 other large mining companies are engaged in the reduction and treatment of copper ore in said mining district near the upper branches and affluents of the Gila River. That for the purpose of reducing and treating the said ores so mined as aforesaid, said defendant has established upon the banks of said San Francisco River and said Chase Creek and upon the sides of the canons debouching into said last-named streams, concentrators of a capacity sufficient to, and which now actually, reduce and treat more than three thousand tons of copper ore each day.

That it has invested a large amount of money in the development of said mining industry and in the installation and equipment of concentrators, smelting and reduction works used in the reduction of the products of said mines; and that the plants of this defendant company now used in said operations represent an investment of about fifteen million dollars. That defendant, in its mining, smelting and reduction of ores gives employment to about 3000 men and that a community of about 12,000 people are dependent for a livelihood upon the operations of the mining works of this defendant and of the other mining companies hereinbefore referred to.

That in the reduction of said copper ores by this defendant
108 said ores are crushed and mixed with water, and that a portion of the slickens, slimes and tailings therefrom finds its way through the creeks, affluents and canals upon which the works of said defendant are situated, into the waters of the Gila River and becomes mingled therewith, and is carried by the waters of said Gila River down to the Upper Gila Valley in which the farming operations of the plaintiff are carried on, and by and through said river and irrigating ditches in the ordinary and necessary course of irrigation, to and upon the cultivated lands of plaintiff, and of others like situated.

VII.

That the Gila River is normally subject to periods of flood and of lower water recurrent several times during each year, due to recurrence of torrential rains alternating with periods without rain or with slow-fall-*y* rains; that during such periods of flood said river carries quantities of sedimentary matter, the product of erosion of the mountains, hills and valleys through which it and its tributaries flow; that this sedimentary matter contains organic fertilizers; that such matter is, at such periods of flood, carried through said irrigating canals in the normal and necessary course of irri-
109 gation, to and upon the lands of plaintiff and upon the cultivated lands of the valley, hereinbefore mentioned, and enhances their fertility, thereby in that respect benefiting said lands; that at such periods of flood the proportion of slickens, slimes and tailings carried by the waters to the whole amount of sedimentary matter so carried is so small as to be negligible in determining the effects of the sedimentary matter upon the cultivated lands. That at the periods of lower water, the water of said river flowed clear and free from sediments prior to the time when such water began to carry slickens, slimes and tailings as herein described, and would continue so to flow clear and free from sediments, but for such slickens, slimes and tailings, and then did and now, but for such slimes, slickens and tailings, would continue to furnish clear water free from sediments to the various canals herein mentioned for the irrigation of the lands of plaintiff and of the other lands herein mentioned; that such clear water free from sediments is more valuable for the purpose of irrigation than water carrying sedimentary matter, whether of the natural products of erosion or of slimes, slickens or tailings; that in about the year 1885 the first concentrator was erected for the reduction of ores in connection with the mining enterprises herein mentioned; that at a time which
110 this Court cannot exactly determine, but some six to eight years before the institution of this action, the waters of the Gila River at other than flood periods, theretofore clear, became discolored by slimes, slickens and tailings and began to deposit such slimes, slickens and tailings through the irrigating ditches herein mentioned in the normal and necessary course of irrigation upon the lands of plaintiff and other lands herein mentioned.

That since the last-mentioned time the quantity of such slimes,

slickens and tailings carried by the said river and so deposited upon said lands of plaintiff and said other lands, continuously increased, until after the institution of this suit; that the said slimes, slickens and tailings so carried upon the said lands of plaintiff and the other said lands consist of finely pulverized rock; are inert; are chemically not injurious to the soil, or to plant life; add nothing of value to the farming lands of said valley for any purpose; are destitute of organic fertilizing material, but contain a small quantity of inorganic fertilizing material of a kind with which the soil of the said lands of plaintiff and other said lands, are, and at the time mentioned herein have been, adequately supplied; that
111 all of said sedimentary matter carried upon said cultivated lands of plaintiff and other said lands, whether the products of erosion, or slimes, slickens and tailings, injuriously affects the said cultivated lands for the purpose of raising crops, in that it becomes deposited in constantly increasing depth on the surface of said cultivated lands, being deposited more heavily and to a greater depth near the points at which the water is immediately applied to said lands for the purpose of irrigation, and becoming progressively thinner as the water passes over the said lands farther from the points of immediate diversion and application; that said deposit of sedimentary matter is injurious to said lands for the purpose of raising crops in several respects: One, in that it elevates the land adjoining the point of immediate application of the said water, thus compelling the taking of the water supply from increasingly high water levels in order to flood the water upon said lands; a second, in that it forms a compact layer over the soil, not readily permeable by water, thus depriving the roots of the plants of the appropriate and necessary irrigation; and a third, in that it packs about the roots and stems of growing plants, thus mechanically choking and burying them to the restriction of their growth and productiveness; that the second named injurious effect is remedial by deep plowing and harrowing, whereby sedi-
112 mentary matter so deposited is mingled with the natural soil; that the most important crop grown by plaintiff and by the cultivators of the other cultivated lands herein referred to, both in the extent of land on which said crop is cultivated, and in the value is of alfalfa, which is a perennial and cannot be plowed without its destruction; that alfalfa reaches its highest productivity at the age of three or four years, and continues at a maximum of productivity, for a lifetime of unascertained duration, in excess of fifteen years; that alfalfa stools at or near the surface of the soil, and that the productivity and thriftiness of the plant is seriously impaired, when the crown at which it so stools becomes covered; that said sedimentary deposits are peculiarly injurious to alfalfa by reason of the fact that they bury the stooling crowns; that the injurious effect of such deposits upon alfalfa may be ameliorated but not obviated by deep harrowing; that the sedimentary deposit upon cultivated soil of slimes, slickens and tailings is more injurious than the natural sediment of erosion (to an extent which the Court can-

not define in a percentage) by reason of the fact that the said slimes, slickens and tailings are much more finely pulverized than the natural sediment of erosion and form a more compact
113 blanket, more nearly impermeable to the passage of water, and when dry, much harder, more cement-like, and more difficult to plow, or harrow; that the said slimes, slickens and tailings are also more injurious to growing plants in their mechanical choking effect than the natural sediment of erosion by reason also of the more fine pulverization of the former and the more compact way in which they become packed on and about the roots and stems of such growing plants; that normally the periods of lower water in the said river come at the times when there is the greatest need of irrigation by growing crops; that for a period of a year or two prior to the institution of this suit the waters of the said river carried such a great volume of slimes, slickens and tailings that layers of such slimes, slickens and tailings, unmixed with other substances, were deposited in some of the irrigating ditches more directly affected thereby and on the soil near the points of immediate application of water therefrom for purposes of irrigation, of a thickness of half an inch or more; that the plaintiff was injured in the loss of the productivity of his fields of alfalfa upon his said lands in the year preceding the filing of this suit, by reason of the sedimentary deposits upon his fields of alfalfa, in an
114 amount which the Court cannot exactly determine, in excess of one thousand ($1,000) dollars; that from the same cause the crops of alfalfa grown upon the other cultivated lands herein referred to during the said year were diminished to an amount and in a value which the Court cannot exactly determine, of many thousands of dollars.

VIII.

The Court further finds that complaints of the effect of said slimes, slickens and tailings were first made by the plaintiff to the said defendant about five years ago, and that thereafter said defendant commenced and thereafter prosecuted the work of arresting the same from entering said Gila River, and that in doing so it has established large and expensive settling works and devised means of carrying off a large proportion of its waste products, and in its said efforts has expended approximately $50,000; that at the time of the trial of this cause about seventy-five per cent of the total waste products of defendant's works theretofore deposited in tributaries of said Gila River were, and now are, arrested, settled and otherwise disposed of, with such result that a large percentage, which the Court cannot determine from the evidence, but fixes as in excess of fifty per cent of the slimes, slickens and tailings
115 theretofore flowing from said works into said river, do not so flow. That at and prior to the institution of this suit, and at the time of the hearing of this cause, other mining companies, including the co-defendants herein, were engaged in the business of mining and reduction of ores upon and near the upper branches and affluents of said Gila River, and contributed from

their reduction works a portion of the slimes, slickens and tailings carried by said river to and upon the lands of plaintiff and other lands herein mentioned.

That after the commencement of this action and before the hearing of this cause the Shannon Copper Company, in consideration of the dismissal of this action as to it, agreed to spare no reasonable effort or expense to minimize the amount of said tailings and waste material from its said works which may find their way into said river, and if possible to do so by any reasonable effort and expense, that it would prevent the flow of any of said tailings and waste material from its said works from flowing into said river, and that said efforts should be made at once, and continued without interruption until the object thereof should be accomplished.

IX.

116 The Court further finds that during the last five years the agricultural lands of the Upper Gila Valley in the vicinity of Solomonville, including the lands of the plaintiff, have greatly increased in market value and selling price, and that that portion of said lands which are set to alfalfa and are known as alfalfa lands have in the last five years increased in value and market price to the same extent as that portion of said lands adapted to and used in the production of cultivated crops.

X.

That the injuries complained of in said complaint are continuous, and constantly increasing. That plaintiff has no adequate remedy at law for the redress of said injuries caused him by said defendant, in this, that the damages caused to plaintiff by the acts of defendant are of a nature not readily susceptible of proof in an action at law for damages, and that said injuries in their ultimate effect are irreparable. That the defendant threatens to, and will, unless restrained by the order of this Court, continue to deposit slimes, slickens and tailings as hereinbefore set forth, to the damage of plaintiff.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

117 And on to-wit: the third day of June, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Report of the Inspector of the settling and impounding works of appellant, in words and figures following, to-wit:

THATCHER, ARIZ., *June* 1, 1910.

Hon. Judge Kent, Phœnix, Arizona.

DEAR SIR: In regards to the tailings proposition there is very little change since last report. The citizens on Hill's Addition have been

holding the Company back from putting in their pipes, but it looks as tho things were settled now.

Mr. Carmichael said he had deposited $5,000 (Five Thousand Dollars) in the bank for the said citizens to use in building a retaining wall.

Yours truly,

R. G. LAYTON.

118 UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true and complete copy and transcript of the record, including the Judgment Roll; Bond on Appeal; Order suspending Judgment; Bond; Opinion; Judgment; Motion for Rehearing; Petition for Allowance of Appeal; Application for Supersedeas; Order Suspending Injunction; Appeal and Supersedeas Bond; Reports of Inspector; Assignment of Errors; Statement of Facts; and all minute entries had and entered of record in a certain cause lately pending in said court, No. 1052, wherein The Arizona Copper Company, Limited, a corporation, was appellant, and William Allen Gillespie was appellee, as the same remain on file and of record in my office, excepting only such parts thereof as have been omitted by direction of attorneys for appellant as not necessary on the hearing of this appeal, and each such omission appears in this transcript with the true reason for such omission stated.

And I further certify that the same constitute the record in said cause.

And I further certify that the attached Citation is the original Citation issued by said Supreme Court.

In witness whereof, I have hereunto set my hand and the seal of said Court, this 21st day of June, A. D., 1910, at Phœnix, Arizona.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
Clerk Supreme Court of Arizona.

119 UNITED STATES OF AMERICA, *ss:*

To William Allen Gillespie:

You are hereby cited and admonished to be and appear at the Session of the Supreme Court of the United States to be holden in the City of Washington, District of Columbia, within sixty days from the date hereof, pursuant to an appeal duly allowed by the Honorable Edward Kent, Chief Justice of the Supreme Court of the Territory of Arizona, and duly filed in the office of the Clerk of said Supreme Court of the Territory of Arizona, wherein The Arizona Copper Company, Limited, is appellant and William Allen Gillespie is the appellee, to show cause, if any there be, why the judgment and decree in said cause mentioned in the said allowance of appeal, should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this seventeenth day of May in the year of our Lord One Thousand Nine Hundred and Ten.

EDWARD KENT,
Chief Justice of the Supreme Court
of the Territory of Arizona.

I, William Allen Gillespie, Plaintiff and Appellee in the above mentioned action, do hereby admit and accept service upon me of the above citation, this 20th day of May, 1910.

WM. A. GILLESPIE.

120 PHOENIX, ARIZONA, *April* —, 1910.

The undersigned Attorney for the appellee William Allen Gillespie in the case of William Allen Gillespie vs. The Shannon Copper Company, et al.—The Arizona Copper Company, Limited, Appellant, do hereby acknowledge service of the above citation on appeal to the Supreme Court of the United States.

Witness my hand this 18th day of May, 1910.

THOS. ARMSTRONG, JR.,
Attorney for Appellee, William Allen Gillespie.

121 [Endorsed:] No. 1052. In the Supreme Court of the Territory of Arizona. William Allen Gillespie, Plaintiff and Appellee, vs. The Arizona Copper Company, Limited, Defendant and Appellant. Citation. Filed May 31, 1910. F. A. Tritle, Jr., Clerk. Kibbey, Bennett & Bennett, Attorneys for Defendant and Appellant.

Endorsed on cover: File No. 22,263. Arizona Territory Supreme Court. Term No. 106. The Arizona Copper Company, Limited, Appellant, vs. William Allen Gillespie. Filed July 18th, 1910. File No. 22,263.

No. 106.

Supreme Court of the United States.

ARIZONA COPPER COMPANY, LIMITED,
Appellant,

against

WILLIAM ALLEN GILLESPIE,
Appellee.

BRIEF FOR APPELLANT.

JOHN A. GARVER,
55 WALL STREET, New York,
WALTER BENNETT,
PHOENIX, ARIZONA,
Counsel for Appellant.

C. G. BURGOYNE, 72 to 76 Spring Street, New York.

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Supreme Court of the United States,

OCTOBER TERM, 1912.

No. 106.

ARIZONA COPPER COMPANY, Limited,
Appellant,

AGAINST

WILLIAM ALLEN GILLESPIE,
Respondent.

Brief for Appellant.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

NOTE: For greater precision and convenience, the references to the Record are to the original or marginal pages.

Statement.

The suit was commenced by the appellee in September, 1906, in the District Court of the Territory of Arizona, Graham County, against the appellant, a Scotch corporation (pp. 1, 16) and against the Shannon Copper Company and The Arizona Copper Company, an Arizona corporation, to enjoin the three defendants from depositing in the waters of the Gila River, or its affluents, any slimes, tailings, concentrates or chemicals (p. 13).

On motion of the plaintiff's attorney, the complaint was dismissed as to the Shannon Copper Company and the Ari-

zona Copper Company (the Arizona corporation), and continued only against the appellant, The Arizona Copper Company, Limited (p. 24). The dismissal as to the Shannon Company was owing to an agreement on its part to do everything possible to minimize the flow of tailings and waste materials from its works into the River (p. 115).

Upon the trial, the District Court, in November, 1907, directed a most sweeping and drastic judgment against the appellant, enjoining it from "*in any wise*, or *in any manner* depositing or suffering or permitting to be deposited or suffering or permitting to flow into the waters of the Gila River," or its tributaries, *any* slime, slickens or tailings (p. 25).

On appeal, this judgment was affirmed by the Supreme Court of Arizona, in March, 1909, with the modification that the trial Court, in its discretion, might subsequently, "upon a proper showing" of efforts "to *effectually* dispose of" the tailings and slimes, modify the injunction in accordance with the conditions shown to exist (p. 76).

An appeal to this Court was thereupon allowed and taken, in February, 1910, the amount involved being in excess of $5,000 (pp. 89-90); and it being made to appear to the Supreme Court of the Territory that, since the commencement of the action, the appellant had constructed and put into operation "large and expensive settling basins and other means and devices designed and intended to arrest, settle and dispose of the slimes, slickens and tailings" and had succeeded in arresting and impounding and disposing of the "*major* portion" of such refuse, the operation of the injunction was suspended during the pendency of the appeal, upon condition that the Company should install and operate such further and other means and devices as might be necessary to keep, so far as practically possible, the objectionable matter from escaping into the Gila River or its tributaries, and upon the further condition that the appellant should give a bond in the sum of $20,000 for any damages that might be sustained, and also

pay an inspector, appointed by the Court, a salary of $150 a month to keep watch of the Company's efforts (p. 92).

In the ordinary process of reducing copper ores, the ores are crushed and mixed with water (p. 108); and the slimes, slickens and tailings are a necessary consequence of the reduction process, being the finely pulverized rock which is left suspended in the water used in the process (p. 110).

Other facts found by the Supreme Court

(pp. 101–116).

No complaint is made of the rulings of the Court upon questions of evidence; and the only question that can be considered upon this appeal is whether, on the facts found by the Supreme Court, the decree was properly made.

Sturr v. Beck, 133 U. S., 541, 546.

Briefly summarized, the essential facts found by the Court below are as follows:

The appellee is the owner of 276 acres of arid land, under irrigation, near the town of Solomonsville, in Graham County, Arizona. This land has been supplied with water from the Gila River, by means of the Montezuma Canal, into which the waters of the Gila River have been diverted, at a point about 25 miles below the confluence of the San Francisco and Gila Rivers (p. 104) near Clifton, in Graham County (p. 102).

No reduction works of the appellant are nearer to the land of the appellee than Clifton (pp. 106–7). The land of the appellee is thus situated at a distance of about 25 miles from the nearest works of the appellant. Portions of this land have been under cultivation, through the use of this water, since about 1872; and the whole of it has been continuously and profitably cultivated during the past fifteen years (p. 103); and excellent and varied crops have been and are now being raised upon the land (pp. 105–6).

The Gila River rises in New Mexico and flows in a westerly direction through Graham County and the other southerly Counties of Arizona, emptying into the Colorado River at the extreme southwestern boundary of the State, at Yuma (p. 102). Chase Creek empties into the San Francisco River above Clifton (p. 102), and, consequently, at a still greater distance from the Montezuma Canal.

The Gila River flows through "a generally mountainous country" (p. 102). In the mountains through which it flows, in the neighborhood of Clifton, are large deposits of copper ore; and *several large mining companies*, including the appellant, are there engaged in the business of mining and reducing these ores (p. 106, Finding VI).

The mining industry was also commenced about 1872, and has been continuously and increasingly prosecuted ever since. Thus, "the mining industry and the farming industry * * * were commenced about the same time and have each grown and increased in importance to the present time" (p. 106).

In the mining district, near the upper branches and affluents of the Gila River, the appellant "*and other large mining companies*" are engaged in the reduction and treatment of copper ores. Upon these streams (not upon the Gila River itself), and upon the sides of the canyons opening into the streams, the appellant has in operation concentrators, at which are now treated more than 3,000 tons of ore a day, and the appellant's plant represents an investment of about Fifteen million dollars ($15,000,000), employing about 3,000 men; and about 12,000 persons are dependent for their livelihood on the operations of the mining works of the appellant and the other mining companies operating in that District (p. 107). In the process of reducing the ores, a *portion* of the resulting "slimes, slickens and tailings" finds its way into the Gila River and ultimately upon the land of the appellee (p. 108).

The Gila River is a stream of regularly recurring violent extremes of condition, owing to torrential floods, which are

succeeded by seasons of practically no rainfall. At times, it is a raging torrent, sweeping everything before it; and, again, it is a shallow, inert stream, a mere film of water, which, in the course of 25 miles, would act as a natural filter for any mineral matter received from its tributaries. During the periods of flood, it bears along, in its onward rush, quantities of sedimentary matter, the product of erosion of the mountains, hills and valleys (p. 108). At such times, the proportion of slimes and tailings to the entire amount of sedimentary matter is so slight as to be negligible, in determining the effects of the sedimentary deposits upon the cultivated lands (p. 109). It is thus only during low water that any appreciable refuse matter can possibly find its way from the works of the appellant and other mining companies to the plaintiff's land. What minute portion of the entire sedimentary deposits complained of is represented by this refuse matter and what proportion of the latter, if any, is traceable to the appellant's works, was not found, and was not even alleged in the complaint.

The clouding of the waters of the Gila River, as the result of the reduction of ores and the resulting deposit upon the plaintiff's land, was apparently not noticeable, even to the plaintiff, until about six or eight years before the present suit was instituted (p. 110).

In the complaint, it was charged that the deposits from the works of the defendant contained acids and poisonous substances, which poisoned the fish and rendered the water unfit for use (p. 11). No finding to that effect was made by the Court below.

It was also averred in the complaint, as a principal cause of the alleged injury sustained by the plaintiff, that the sediment was deposited near the head of the Montezuma Canal in such large quantities as to raise the banks of the canal, and, consequently, to make it more difficult to obtain the water from the canal for irrigating purposes (pp. 10, 13). This fact was found by the Court below (p. 111); but the Court also

found that the amount of slimes and tailings, in comparison with the total amount of sedimentary matter deposited, was negligible (p. 109). Obviously, this cause of injury cannot be attributed to the appellant.

Another injury complained of and found by the Court was that the sediment (principally that of erosion) buried and choked the plants to such an extent as to interfere with their proper growth (p. 111). This was also a question of quantity and cannot be attributed to the appellant.

The only other injury complained of and found by the Court was that the sediment formed a compact layer over the soil, not readily permeable by water, thus tending to deprive the roots of necessary moisture (p. 109). This difficulty must also result, in large measure, from the quantity of the sediment; but the Court found that it could be obviated by deep plowing and harrowing, except in the case of alfalfa, which is a perennial, making it impossible to plow the land where it is planted, though it may be harrowed (p. 112). The slimes and tailings are not injurious to the soil as the result of any chemical qualities. Indeed, they contain a small quantity of inorganic fertilizing material (p. 110), which is, of course, beneficial, though it is not required upon the land of the appellee. Its objectionable characteristic is that it is so finely pulverized that when it is finally deposited on the land, it forms a more compact mass than the other sedimentary matter, becomes harder when dry, thus being more difficult to plow and harrow, and is, therefore, more injurious than the natural sediment of erosion (pp. 12–13).

On the question of the extent and effect of the sedimentary deposits, the Court below did not confine its findings to the plaintiff's land or to the Montezuma Canal, but included all the land in the upper Gila valley, comprising several thousand acres (p. 104). It also included in its findings other irrigating ditches, the location of which was not even specified (p. 113), except that they are in a territory bordering on the Gila River, for

about 35 miles. Some of them are, therefore, nearer to the appellant's works than the Montezuma Canal, which, as heretofore stated, is about 25 miles below the confluence of the San Francisco and Gila Rivers (p. 104).

That the injuries sustained by the plaintiff were trivial and largely speculative and imaginary, is obvious from the Ninth Finding of the Court, showing that, during the last five years, when alone any complaints were made by the plaintiff (p. 114), his lands have "*greatly increased in market value and selling price.*" That finding is as follows (p. 116):

> "The Court further finds that during the last five years the agricultural lands of the Upper Gila Valley, in the vicinity of Solomonsville, including the lands of the plaintiff, have greatly increased in market value and selling price, and that that portion of said lands which are set to alfalfa and are known as *alfalfa lands have in the last five years increased in value and market price to the same extent* as that portion of said lands adapted to and used in the production of cultivated crops."

As showing the disposition of this appellant to prevent any consequential injuries resulting from the operation of its works, the Court found that Mr. Gillespie first complained to the Company about five years ago, and that, thereupon, the Company commenced and prosecuted the work of arresting the deposit of this waste matter, and, to that end, established large and expensive settling works, at an expenditure of about $50,000; and, at the time of the trial of this cause, it had already succeeded in preventing about 75% of its total waste products from entering the water, including more than 50% of the slimes and tailings (p. 115).

There is no averment or intimation in the complaint, and no finding, that the works of the appellant or of any of the other mining companies have been operated carelessly or could be operated in such manner as to prevent *all* tailings

and fine sediment held in solution from finding its way into the waters of the River. On the contrary, the Court expressly found that it was impossible for the appellant to impound all the sedimentary matter (p. 65), but that this might be done by the farmers, at moderate expense, by constructing settling basins near the heads of the canals (p. 65).

Specification of Error.

Upon the facts found by the Court below, it erred in affirming the decree in favor of the plaintiff and should have granted judgment in favor of the defendant, reversing the decree and dismissing the complaint; because, no reason was shown for granting the plaintiff any equitable relief.

POINTS.

FIRST.

No public nuisance.

I. The complaint was drawn on the theory that the escape of waste matter from the reduction works of the defendant and other mining companies, into the streams emptying into the Gila River, constituted a public nuisance, causing special damage to the plaintiff; and this view was urged upon the Court below by counsel for the appellee, and was adopted by the Court.

Even if the acts complained of constituted a public nuisance, the injury to the plaintiff, as clearly appears from the averments of the complaint, did not differ in kind from that sustained by other members of the community in which the

plaintiff's farm was situated; and, consequently, the plaintiff could not maintain the action.

Joyce on Injunctions, Sec. 1081;
Live Stock Co. v. McIlquan, 14 Wyo., 209;
Donahue v. Stockton Gas, etc. Co., 6 Cal. App., 276, 280;
Kuehn v. Milwaukee, 83 Wis., 583;
Jarvis v. Santa Clara, 52 Cal., 438.

The Court below held that the injury to the plaintiff did differ in kind from that sustained by the other members of the community, and, consequently, that the plaintiff could maintain the action (p. 68).

II. In the conclusion thus reached, the Court was clearly in error; because, all streams of running water in the Territory were made public, for the purposes of irrigation and mining, including, necessarily, as one of the incidents of the latter, the use of water in the reduction of the ores. The statutory provisions upon this subject are as follows (Rev. St. 1901):

"4168. (Sec. 1). The common law doctrine of riparian water rights shall not obtain or be of any force or effect in this territory."

"4169. (Sec. 2). Any person or persons, company or corporation shall have the right to appropriate any of the unappropriated waters or the surplus or flood waters in this territory for delivery to consumers, rental, milling, irrigation, mechanical, domestic stock or any other beneficial purpose, and such person or persons, company or corporation for the purpose of making such appropriation of waters as herein specified, shall have the right to construct and maintain reservoirs, dams, canals, ditches, flumes and any and all other necessary waterways. And the person or persons, company or corporation first appropriating water for the purposes herein mentioned shall always have the better right to the same."

"4174. (Sec. 7). All rivers, creeks and streams of

running water in the Territory of Arizona are hereby declared public, and applicable to the purposes of irrigation *and mining*, as hereinafter provided."

"4178. (Sec. 11). No inhabitant of this territory shall have the right to erect any dam, or build a mill, or place any machinery, or open any sluice, or make any dyke, *except such as are used for mining purposes or the reduction of metals*, as provided for in sections six and seven* of this chapter, that may impede or obstruct the irrigation of any lands or fields, as the right to irrigate the fields and arable lands shall be preferable to all others; and the justices of the peace of the respective precincts shall hear and determine the question relative to all such obstructions in a summary manner, and cause the removal of the same by order directed to the constable of the precinct or sheriff of the county who shall proceed to execute the same without delay."

* Sections 6 and 7 of the Revised Statutes of 1887. The reference should be to Sections 12 and 13.

"4179. (Sec. 12). Where reduction works or other mining apparatus shall be placed upon lands previously held for agricultural purposes, the person or persons so holding such lands shall be entitled to remuneration from the person or persons erecting or owning said reduction works or mining apparatus. The amount of remuneration shall be adjudged by three or five disinterested persons or by the probate judge, as the parties interested shall agree, and in case such agreement can not be made, then *the party injured may bring suit for damages.*"

"4180 (Sec. 13). When any ditch or acequia shall be taken out for agricultural purposes, the person or persons so taking out such ditch or acequia shall have the exclusive right to the water, or so much thereof as shall be necessary for said purposes; and *if at any time the water so required shall be taken for mining operations, the person or persons owning said water, shall be entitled to damages*, to be assessed in the manner provided in section six* of this chapter."

* Should be Section 12.

"4196 (Sec. 29). If any person shall in any manner interfere with, impede or obstruct any of the said acequias, or use the water from it without the consent of the overseer, *except as provided in section seven* of this chapter*, during the time of cultivation, he shall pay for each offense a sum not exceeding ten dollars, which shall be recoverable in the manner prescribed in the foregoing section for the benefit of said acequia; and he shall further pay all damages that may have occurred to the injured parties; and, if such person has not wherewith to pay said fine and damages, he shall be sentenced to fifteen days' labor on said public acequia."

* Should be Section 13.

These provisions are substantially indentical with those contained in the Revised Statutes of 1887 (Secs. 3198-9, 3203-5).

III. If a mining company may lawfully use the streams for the purposes of its business, such use cannot be unlawful or constitute a public nuisance, unless the Company willfully or carelessly so uses the water as to infringe upon the rights of others.

Kinney on Irrigation, Secs. 250, 251;
40 Cyc., 708, 713;
Hill v. Standard Mining Co., 12 Idaho, 223, 236;
Bernard v. Sherley, 135 Ind., 547, 555.

But nothing of that kind was found by the Court below, and nothing of the kind is alleged or intimated in the complaint. Therefore, the suit cannot be maintained on the ground that the reasonable use of the streams of Arizona by the appellant for its mining purposes constitutes a public nuisance *per se*.

IV. Even if the mining industry had not been so clearly authorized by the Legislature, yet, as it is the paramount in-

dustry of the State and overwhelmingly dominates all the other industries, the courts of equity should refuse to treat it as a public nuisance, even though it could not be conducted, by the exercise of reasonable care, without inflicting some injury upon others.

The public convenience will always be considered in determining whether certain acts constitute a nuisance.

Pomeroy's Eq. Remedies, Sec. 529.

SECOND.

Appellee has no exclusive or superior rights as prior appropriator.

A further theory referred to by the lower Courts was that the plaintiff had acquired a prior right to the use of the waters of the Gila River, which could not be interfered with by the use of the waters of its affluents by the defendant for any of the purposes incidental to its mining operations. In accepting this theory, the Court below was also in error.

I. The common law doctrine of riparian rights has not obtained in Arizona since 1887; and it probably has never been recognized there.

Rev. Stat. 1887, Sec. 3198;
Rev. Stat. 1901, Sec. 4169;
Boquillas Cattle Co. v. Curtis, 213 U. S., 339.

At common law, all riparian proprietors have precisely the same rights to flowing waters, and no one could so use the stream as to interfere with its reasonable use by those above and below him. The right was in the current *(aqua currit, et*

debet currere ut currere solebat), which no one was at liberty to impair, either in quantity or quality. There was, consequently, no right to divert it for purposes of irrigation, especially in favor of one who was not a riparian proprietor.

3 Kent Comm., 439 ;
40 Cyc., 559 ;
New York City v. Pine, 185 U. S., 93, 96-7.

II. The Court below concluded that, by the abolition of ripraian rights, the plaintiff, as the first appropriator, had acquired the exclusive right to the use of the water, which could not be interfered with by the defendant (p. 69). In this conclusion, the Court erred, both in its understanding of the facts and of the law.

1. The Court found that " the mining industry and the farming industry * * * were commenced *about the same time* (1872) and have each grown and increased in importance to the present time " (p. 106). There is clearly no priority in this finding. While there is also a finding that the first concentrator was not erected for the reduction of ores until about 1885 (p. 109), this does not mean that ores were not reduced by crushing and mixing with water (the ordinary process, p. 108) prior to that date. There would obviously have been no reason for mining the ores prior to 1885, unless they could have been reduced and the metal extracted. The mere fact that an improved form of reduction or concentration may have been discovered would have no bearing upon the question of priority. Every industry is affected by the advance in the arts ; and while some of the steps taken may be greater than others, the industry itself dates from its initial stages.

Even if the doctrine of prior appropriation could be applied to partial stages of progress, the appellee would be in no better position. He has obtained a sweeping

injunction, because his 276 acres of land have been affected; but only *portions* of this land have been cultivated since 1872. It is only during the past fifteen years, or since about 1891, that the whole of the plaintiff's land has been under cultivation (p. 103). But the defendant's concentrator has been used since 1885 (p. 109). On the mere question of priority in time, therefore, the defendant is clearly first.

2. The Court also erred in its application of the law to its erroneous assumptions of fact. By Section 22 of the Bill of Rights (Political Code), no one could acquire an exclusive right to the use of any stream for the purpose of irrigation. All that a prior appropriator is entitled to, as against others, is a sufficient quantity of water to satisfy his appropriation, while its quality cannot be impaired so as to interfere seriously with the use to which it has been appropriated.

Kinney on Irrigation, Secs. 250, 251;
40 Cyc, 708, 713.

This is not essentially different from the principle recognized under the common law doctrine of riparian rights. A lower riparian owner cannot complain of the reasonable use of the stream, even if he is injured thereby.

Merrifield v. Worcester, 110 Mass., 216;
Hayes v. Waldron, 44 N. H., 580;
Strobel v. Kerr Salt Co., 164 N. Y., 303, 320;
Pennsylvania Coal Co. v. Sanderson, 113 Pa. St., 126, 146.

The difference is mainly in the extent of the use. As between two appropriators for irrigation purposes, the first in time might use all of the water of the stream, at certain seasons (Sec. 4191). But the principle of priority is not recognized as between an appropriator

for irrigation and a subsequent appropriator for mining purposes. This clearly appears from the statutory provisions set forth in the preceding Point (*ante*, pp. 9-11). The right to use a stream for mining purposes, including the reduction of metals, is made paramount.

Section 4178 expressly permits a mining company, in the reduction of its ores, to impede or obstruct the irrigation of any lands; and Section 4179 contemplates the physical seizure and possession of irrigated lands for reduction works or apparatus; and, by Section 4180, the only consequence of the appropriation by a mining company of water previously used for irrigation purposes, is to render the appropriator liable for damages; and this right of the mining company is further recognized in Section 4196.

III. In thus giving precedence to the mining industry, the Legislature merely recognized the well-known fact that the welfare of Arizona is peculiarly dependent upon the development of its mineral resources. The State has more ore and mineral bearing land than any other State of the Union. It now leads all the States in its copper output, contributing more than one-fourth of the entire copper production of the United States. The cultivation of the soil is a mere incident to the development of the mines. The entire area of the State is 113,956 square miles (72,932,840 acres), of which the farming area constitutes only about two per cent., while less than one per cent. is under cultivation. The population, in 1910, was about 204,000, or not equal to two-thirds of the population of the City of Washington; and the greater part of this population was undoubtedly supported by the mining industry, the defendant alone giving employment to about 3,000 men (p. 107), who, with their families, would, in themselves, represent a large community.

The rivers of Arizona, including particularly the Gila

River, run through mountainous territory (pp. 102, 106); and its arid plains probably gave the territory its Spanish name, signiyfying the arid zone; for the water surface constitutes less than one-tenth of one per cent. of the entire area, and the irrigated areas are mere specks upon the map.

In view of these conditions, it was inevitable that the Legislature should have expressly provided that the principal industry of the Territory should not be hampered by claims of prior rights on the part of farmers, and that it should have conferred on the mining companies a power substantially equivalent to that of eminent domain, and, in some respects, superior, in so far as it permitted the occupation of land before the assessment and payment of damages.

IV. It necessarily follows, that the only duty owing by a mining company to other users lower down the stream using the water for irrigating purposes, is to so conduct his business as not unnecessarily to interfere with the rights of such users; and this principle was recognized by the Court below (p. 69).

As heretofore stated, (*ante*, pp. 7, 8), it was not found, and not even alleged in the complaint, that the defendant could, by any reasonable precautions, have prevented the slimes and tailings from finding their way into the Gila River. On the contrary, the Court expressly found that it could not do so (p. 65).

THIRD.

Adequate remedy at law.

Even if it had been alleged and found that the defendant had operated its reduction works carelessly, the plaintiff had an adequate remedy at law for the damages sustained.

I. The public policy of the Territory is apparent in the express provision of the statute (Sec. 4179), that where, in the course of mining operations, the rights of one already using the public streams for irrigation purposes are invaded, his remedy is limited to a claim for the damages sustained, to be ascertained by arbitration or by a "*suit for damages.*" This is so, even where the mining company takes actual physical possession of part of the irrigated lands, as well as where the mining operations merely constitute an interference with the water employed in the irrigation (Sec. 4178). Thus, the Legislature carefully restricted the remedy in such cases, where the damages cannot be determined by agreement, to an action for damages.

The principle is the same as that involved in the exercise of the right of eminent domain. Under the policy of the law prevailing in Arizona, the appellee has no greater right to stop the operation of the appellant's works than he would have to enjoin the construction of a railroad, where the railroad company possessed the power of eminent domain. When that power exists, even though it has not been exercised, the courts will not grant an injunction, if the railroad company pays the damages assessed by the court.

Story v. N. Y. El. R. Co., 90 N. Y., 171, 179;
Am. Bank Note Co. v. N. Y. El. R. Co., 129 N. Y., 252, 270.

Indeed, even where the power of eminent domain does not exist, a court of equity has undoubted authority to take full possession of the controversy and end it, by requiring the payment of adequate compensation in lieu of the cessation of the trespass.

New York City v. Pine, 185 U. S., 93, 104.

II. There is no ground for claiming, as was done in the Court below, that, in the present case, the damages sustained cannot be estimated. The mere fact that it might be difficult

to assess the exact damages is no reason for granting an injunction. That is a difficulty inherent in the conditions existing in all cases where an action at law is brought to recover damages for an injury to property or for a breach of contract; but the mere existence of the difficulty is of no consequence.

Wakeman v. Wheeler & Wilson Co., 101 N. Y., 205, 209.

III. The court below expressly found, upon the "uncontradicted testimony," that it was practicable to construct and maintain, "*at moderate cost*," settling basins near the heads of the various canals, by means of which much of the sediment, including that from the defendant's works, might be prevented from entering the canals (p. 65); but it thought that "the farmers" (it lost sight of the plaintiff alone) should not be required to construct and maintain such basins (p. 75). If, however, this result could be attained by actually constructing such settling basins, obviously the damages could be estimated with absolute accuracy.

FOURTH.

No absolute injunction.

I. Even if it had been alleged and found that, by the employment of proper devices, the appellant could have prevented any injury to the plaintiff's land, the injunction should in no event have been broader than the injury shown to exist. But the Court below affirmed the judgment of the trial Court, which enjoined "any" slimes or tailings from reaching the River (p. 25), although it had expressly found, on the uncontradicted evidence, that it was *impossible* for the Company to

do this, and it recognized that the effect of the injunction would be to shut down absolutely its reduction works at Clifton (p. 65), the largest place in Graham County. It is no amelioration of the effect of this order, to permit the appellant to apply to the trial Court for a modification of the injunction, "upon a proper showing;" because, it is unreasonable to close the works completely when efforts are being honestly made to lessen the evil, and because under the decision below, no showing is possible that the appellant can exclude *all* waste material from reaching the water, while, in affirming the judgment, the Supreme Court held that this must be done.

II. In a suit in equity, the conditions existing at the time of the trial control.

Haffey v. Lynch, 143 N. Y., 241, 248;
Dieterich v. Fargo, 194 N. Y., 359, 363;
U. S. v. Trans-Missouri Freight Assn., 166 U. S., 290, 342.

The Court found that as soon as the plaintiff made any complaint to the defendant, the latter at once exerted itself to obviate the cause of the complaint and expended a large amount in doing so, with great success (p. 114). The inspector appointed by it reported that these efforts had been continued in good faith (pp. 97, 98, 99, 117). That is all that the Shannon Company has done or has agreed to do (p. 115). It is all that should be required of any one. If an injunction could be issued at all, why should not the plaintiff have been satisfied with one in the terms of the Shannon agreement? Can a principle be applied to an alien corporation different from that which the plaintiff himself recognizes to be applicable in the case of an American corporation?

In Georgia v. Tennessee Copper Co. (206 U. S., 230), this Court recognized the distinction existing between the case of a suit brought by a State and one brought by an individual, and the disposition to grant equitable relief in the former case but, in the latter, to leave the owner to his action at law (p. 238). Yet,

even in that case, it declined to grant the injunction until after a reasonable time had elapsed in which the defendants might be able to demonstrate the success of their efforts to lessen the effect of the fumes complained of (p. 239).

FIFTH.

No ground shown for any injunction.

I. If, as pointed out in the Third Point, the plaintiff had an adequate remedy at law, there was, of course, no ground for any injunction.

II. A permanent injunction will not be granted unless the evidence clearly establishes the invasion of the plaintiff's rights by the defendant, with a resulting *substantial* injury.

1. The injuries principally complained of in the complaint were, first, the deposit of sedimentary matter near the head of the canal, in such quantities as to raise its banks and thus interfere with the use of the water in the canal, and, second, the covering of the plants with the sediment. This, however, cannot be attributed to the slimes and tailings from the appellant's works, as the Court found that in the large amount of sedimentary matter (principally the result of erosion, carried down by the floods, the slimes and tailings, even though including those from the works of other companies, were a negligible quantity (p. 109). The sole remaining ground of complaint, that the sediment formed a compact layer over the soil not readily permeable by water, was also due to the quantity of sediment as well as to the slimes and tailings from the works of the appellant and other

mining companies; and the court found that this could be largely overcome by plowing and harrowing (p. 112).

2. The explicit finding of the court, that, during the last five years, the lands of the plaintiff have greatly increased in market value, including the portion devoted to the cultivation of alfalfa (p. 116), is absolutely inconsistent with the possibility of any substantial damage to the plaintiff's land. The damage that seemed to have influenced the Court below was the supposed damage to the community at large and not any damage actually sustained by the plaintiff.

3. There is no finding that any appreciable injury to the plaintiff's land was caused by the defendant alone. Throughout his sworn complaint, the plaintiff has declared that the acts complained of were committed by all of the defendants. Any injury was, therefore, only in part due to the defendant; and the findings of the Court emphasize this (pp. 106-7, 112-13). But, under the judgment entered, the defendant's works must be closed and remain closed so long as *any* waste matter, from *any* concentrator, whether operated by the defendant or not, finds its way upon the plaintiff's land; because, the deposit of *all* such matter has been attributed to this appellant by the lower courts, notwithstanding the express allegation in the complaint and the express finding by the Court that other mining companies, as well as the defendant, and also the forces of nature, have contributed to the result. Under such circumstances, an injunction will be denied; because it would not materially improve the plaintiff's condition.

Wood v. Sutcliffe, 3 Simons (N. R.), 163.

III. An injunction will not be granted where the injuries to the plaintiff are slight and where the consequences of

the injunction to the defendant and others may be very injurious.

1 Spelling on Injunctions, Sec. 417;
Powell v. B. & G. Furniture Co., 34 W. Va., 804;
Clifton Iron Co. v. Dye, 87 Ala., 468;
Madison v. Ducktown etc. R. Co., 113 Tenn., 331;
McClure v. Leaycraft, 183 N. Y., 36, 44.

No case could furnish a more striking illustration of this proposition than the case at bar.

1. The damage sustained by the plaintiff from all the sedimentary matter carried down the river was not sufficient to prevent a great increase in the market value of his land; and as the slime and tailings from reduction works on the upper streams constituted a negligible part of all this sediment, and as there are other tensive works than the appellant's in operation, it is obvious that any damages sustained from the appellant's waste matter was infinitesimal.

2. On the other hand, the disastrous consequences to the defendant of an injunction is expressly recognized by the Court below, in the shutting down of at least one of its concentrators (p. 65). The total valuation of all property in Arizona, in 1906, was only $62,227,633. The appellant alone has expended in the development of its business $15,000,000 (p. 107). Clifton, without the business of the appellant, would rapidly dwindle and disappear from the map, after the manner of mining towns where the mines have been exhausted.

IV. Equity regards relative values. The sense of proportion and relativity is uppermost in the application of equitable principles. "Such an emission of smoke as would constitute a nuisance in the City of New York might afford no just

ground of complaint in Pittsburgh" (Bates v. Holbrook, 171 N. Y., 460, 475). But the Court below decided this case as strictly as if it had been an action at law. It would have rendered the same decision, had it applied the law as rigidly, if the plaintiff had been merely cultivating his private vegetable garden.

V. In the contemplation of personal rights, equity will not lose sight of the public interest. A court of equity is never active in granting relief against public convenience merely for the purpose of protecting a technical legal right.

Smith v. Clay, 3 Browns, Ch., 639, note;
Knoth v. Manhattan Ry. Co., 187 N. Y., 243;
New York City v. Pine, 185 U. S., 93, 99.

If the judgment in this case is sustained, a precedent will be established that will inevitably affect the entire mining industry of Arizona, for it is impossible to conduct mining operations without the use of water in the reduction of the ores, and it is also impossible, according to the finding of the Court, to reduce the ores without permitting some of the tailings to reach the streams (p. 65); and it is inconceivable that there will not be other farmers, with alleged prior water rights, who will be able to show at least as much injury as the plaintiff has shown in the present case, resulting from the operation of reduction works by this defendant and other mining companies. It would take but few such actions to put an end to all mining operations in Arizona. No such disastrous consequences should be permitted upon the vague claims and surmises upon which the judgment appealed from is based, especially in view of the clear public policy of the State to foster and protect its paramount industry. To permit the plaintiff to refuse to accept a sum representing the damages actually sustained or likely to be sustained by him, and insist upon an unconditional injunction which will result in obstructing and possibly terminating a

great industry, would be to furnish him, in the language of this Court, with "a club to compel payment of the sum he deems the measure of his damages".

New York City v. Pine, 185 U. S., 93, 97.

SIXTH.

The judgment of the Supreme Court of the Territory should be reversed and the complaint should be dismissed.

Washington, January, 1913.

JOHN A. GARVER,
WALTER BENNETT,
Counsel for Appellant.

INDEX.

TABLE OF CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 106

ARIZONA COPPER COMPANY, Limited, *Appellant*,

vs.

WILLIAM ALLEN GILLESPIE, *Appellee*.

BRIEF IN BEHALF OF APPELLEE.

1.

STATEMENT OF THE CASE.

This appeal presents for review a judgment enjoining the appellant mining company from depositing tailings and slickens in the waters of the Gila River, with authority vested in the trial court to enforce or modify the injunction in accordance with the conditions as they may exist from time to time. The judgment of the trial court is found upon pages 13-14 of the transcript of the record; the modification of this judgment is ordered in the opinion of the Supreme Court of Arizona found at page 41 of the transcript and the judgment of the Supreme Court of Arizona is found at pages 41 and 42 of the transcript.

The facts upon which the judgment is based as shown by the evidence are practically undisputed. The Gila River, one of the principal rivers of Arizona, and a non-navigable stream, traverses the State in an easterly and westerly direction and has amongst its tributaries the San Francisco

River and Chase Creek. Chase Creek enters the San Francisco River at the town of Clifton and the San Francisco River flows into the Gila River some twenty to twenty-five miles above the town of Solomonville. Clifton, the center of the mining district affected, is situated in a mountainous country where are found immense deposits of copper being worked by the Detroit Copper Company, Shannon Copper Company and the Arizona Copper Company, Limited. This mining industry supports the towns of Morenci, Metcalf and Clifton, in all a population of from fifteen to eighteen thousand people.

The first mining operations were commenced about 1872, but nothing of consequence in the reduction of ores was undertaken until about the years 1885 and 1886, at which time a small concentrating plant was built by the appellant, the Arizona Copper Company, Limited, upon the San Francisco River at Clifton. Later and with the increase of operations this plant was greatly enlarged until at the time of the filing of the complaint it had a daily capacity of 700 or 800 tons. Other plants were later erected by the appellant. Concentrator No. 5, called the "Longfellow," was located upon a canyon debouching into Chase Creek, with the same capacity, and was erected about 1901. The No. 6 concentrator was erected by the appellant upon the Morenci canyon emptying into the San Francisco River. It was placed in operation about 1906 and had a capacity at the time of the trial of about 900 tons a day.

In these concentrators the mineral bearing rocks are reduced to a coarse powder, in which process a large portion is reduced to a more highly divided state. The mineralized elements which constitute but a small portion are separated from the residue, the coarser particles of which are spoken of as tailings, and the finer particles as slickens or slimes. The concentrator at Clifton is located directly upon the San Francisco River. A large portion of the tailings from this concentrator is used as ballast upon the company's railroad, and the finer tailings and slimes were at the time of trial run directly into the San Francisco River. The tailings from the other two concentrators are mixed with enough water to carry them down the canyons in cool weather. In the summer months the evaporation of the water is

such that a portion of these tailings are piled up in the canyon, and only such portion as the water is able to move reach the river. At the time of the trial, in the canyon leading down from the Longfellow concentrator, tailings had settled two to four feet deep in some of the curves of the creek. The deposit from the concentrator at Clifton at times before the issuance of the injunction herein formed a dam across the river, impounding waters in the stream and forming a lake. Formerly there was a travelled road along the river which was abandoned because it became so boggy from tailings.

The farm of Mr. Gillespie, the appellee herein, lies in the upper Gila valley in a strip of farming country on both sides of the Gila River. This farming district extends from a point some five miles above the town of Solomonville to about twenty-five miles below. There are some twenty-three thousand acres of land in cultivation irrigated from the Gila River. It lies in an arid region where it is impossible to successfully cultivate land without irrigation.

This district supports three towns and some villages, in all a community of approximately 10,000 people. Farming was first commenced in 1872, about the same time as the first mining operations about Clifton. The appellee has some 275 acres of land under cultivation under the Montezuma canal, and water for his land was first appropriated in that year.

Some five or six years before the trial, and about the year 1901, with the increasing reduction of ores in the Clifton mills, tailings and slimes were first noticed by the farmers at the heads of their canals. From that time to the granting of the injunction herein there was a continuous deposit of these tailings upon the lands throughout the farming district. By reason of these deposits the alfalfa crop, which is the principal staple raised in the valley, has been diminished one-third. The appellee estimated that his total damage caused by the tailings in the past five years had been in excess of $10,000.00, and that the year preceding the suit his loss had been $2,000.00.

The effect of the deposit of tailings and slimes upon the soil of the Upper Gila Valley was studied by Mr. R. H.

Forbes, Director of the Agricultural Experiment Station of the University of Arizona in connection with his general study of the effect of deposits upon soils of the various irrigating sections of the State. The period of observation extended over a number of years. Mr. Forbes was the only expert witness called upon either side. He was placed upon the stand by the appellant, and the result of his observations are to be found in Bulletin No. 53 University of Arizona Experiment Station "Irrigating Sediments and their Effect upon the Crops." This bulletin was introduced by the mining company without objection from the appellee. Prof. Forbes in this bulletin thus describes the effect of these tailings upon the soil:

> "This fine, detrital material, consisting in large part of decomposed, kaolinized porphyry, has a chemical composition approaching that of clay. Being notably plastic in character, it forms an exceptionally impervious blanket, so effective, that at the heads of fields, even immediately after irrigation, the soil within the second six inches from the surface has in some instances been observed in a dust-dry condition; while at the lower ends of the same fields, with but little accumulation, the same irrigation has penetrated several feet.
>
> "Being thus partly shut away from the water supply the roots of alfalfa fail to support vigorous growth, the tops are stunted, bloom prematurely, and sometimes wither before normal growth is ready for cutting. The ground under this scant covering being comparatively unshaded and therefore exposed to wind and sun, dries and cracks in hot weather, thus involving the soil and the crop in a destructive sequence of bad conditions, so that, notwithstanding the application of irrigating water, the crop actually suffers from drought.
>
> "These sediments are from various sources, but for the last few years * * * and with the increasing operations at the mines, are evidently chiefly from the San Francisco, into which, from the Clifton-Morenci District, large quantities of tailings from copper ore are discharged by the mills into the river. The finer

portions of this waste material are in most minutely divided condition, and are, therefore, carried by the water as long as it has motion, being finally deposited only when it sinks into the soil in irrigated fields.

"Although ordinarily, the percentages of these tailings sediments in irrigating waters containing them are comparatively small, yet they are constantly present, since the mills contributing them rarely stop operations. There is, therefore, no escape from them * * and slow, ceaseless accumulations consequently gain in depth year by year until the effects, especially upon alfalfa, have become evident * * ."

The Professor summarizes his observations as follows:

"Irrigating sediments may be beneficial or harmful to crops according to their composition and physical character, and their disposition in or upon the soil. Whether beneficial or harmful in composition, if they accumulate upon the surface of the soil in the form of silt-blankets more or less impervious to water and air, their influence, by limiting the supply of these essential substances to plant roots, is notably harmful. In certain localities where these irrigating sediments are very plastic in character and excessive in amount the damage, particularly to alfalfa and other crops which cannot receive constant and thorough cultivation, is of an increasingly serious character.

"Cultivation, where practicable, as deep and thorough as possible, is the best available means of handling these accumulations. Beneficial sediments are thus incorporated with the soil and their fertilizing properties made available to plant roots; while sediments of barren character are dispersed to the depth of cultivation through the soil. When, however, sediments of undesirable character predominate, cultivation can only modify and not remedy resulting conditions.

"Mining detritus in the instances observed, is nearly or quite devoid of nitrogen and organic matter, most required by desert soils, and is probably without ferti-

lizing value. The plastic character of this mining detritus, and the excessive amounts in which it accumulates upon certain alfalfa lands result in an extreme instance of deterioration in yield due to irrigating sediments."

The trial judge, Hon. Frederick S. Nave, made a personal inspection of the farm of Mr. Gillespie during the course of the trial. The findings of fact signed by the trial judge are omitted by direction of the attorneys for appellant (page 13, Transcript of Record) but are fully set forth in the opinion of the Supreme Court of Arizona on page 31 *et seq.* The results of his personal observation, as well as his conclusions from the evidence are embodied in these findings, particularly at pages 33 to 35 of the Transcript of Record.

The record discloses that prior to the institution of this action the Detroit Copper Company and the Shannon Copper Company were contributing factors in the injury complained of by the appellee. The Detroit Copper Company had, at the complaint of the farmers of the Upper Gila Valley, taken effective means to prevent the tailings from their plant reaching the irrigating waters of the Gila River. The Shannon Copper Company was made a party to the action, but shortly before the trial the Shannon Copper Company entered into an agreement to keep its tailings out of the stream. Hence the action was dismissed as against the Shannon Copper Company. The memorandum of agreement between the Shannon Copper Company and William Allen Gillespie and others is omitted from the record by direction of the attorneys for the appellant (page 13, Transcript of Record). The reason for the dismissal as to the Shannon Copper Company is found in the statement of facts by the Supreme Court of Arizona (page 59, Transcript of Record). The case was dismissed as against the Arizona Copper Company, it appearing that this company was a holding company. The injunction was entered against the Arizona Copper Company, Limited, alone, which is the operating company and the appellant herein.

This judgment was rendered the 5th day of November, 1907, with a proviso that it should not become operative

until May 1, 1908, in order to permit the Arizona Copper Company, Limited, to make arrangements for caring for its tailings without shutting down its plants. In March, 1908, the mining company applied to the Supreme Court of Arizona for an order suspending the judgment upon a showing that it was using diligent efforts to decrease the amount of waste material finding its way into the Gila River, but was not in all respects able to comply with the injunction. An order suspending the judgment pending the appeal was made March 27, 1908. (Order suspending judgment page 27, Transcript of Record). The opinion of the Supreme Court upon the appeal was handed down March 20, 1909, wherein the judgment of the trial court was modified, vesting in the trial court authority to enforce or modify the injunction in accordance with the conditions as they should be found to be. The injunction was further suspended until the November 8, 1909 session of the court (page 44, Transcript of Record). Upon the appeal to the Supreme Court of the United States being perfected, the mining company asked a further suspension of the injunction (page 46, Transcript of Record), which suspension was ordered upon the terms and conditions found in the order (pages 47 and 48 of the Transcript). Under the order of the court Richard Layton was appointed for the purpose of inspecting and reporting to the court the condition of such impounding works. Three of his reports are printed upon page 51 of the Transcript of Record. From the fact that no further reports are printed, although this officer has made these reports monthly since that time, we assume that the reports printed include all those made before the transcript of the record was ordered by the appellant.

II.

BRIEF OF ARGUMENT.

A. *The denial of the motion to strike certain portions of plaintiffs complaint was proper, inasmuch as plaintiffs complaint was that of a private individual suffering special injury suing to enjoin a public nuisance.*

The first assignment of error (page 52, Transcript of Record) urges error in the denial of the appellant's motion

to strike certain portions of the complaint pointed out in the motion (page 13, Transcript of Record). We assume that this error is assigned here, as it was in the Supreme Court of Arizona and as originally made in the trial court, to place the appellee on record as to the theory of his action. The theory of the complaint is that the plaintiff as a private individual suffering special injury from a public nuisance is entitled to injunctive relief against such nuisance. Such being the theory of the complaint, the propriety of the allegations sought to be stricken is elementary.

This assignment, although not considered by the Supreme Court of Arizona, was not called to that court's attention by appellant's motion for rehearing (page 42, Transcript of Record) and we feel justified in treating the assignment as purely formal.

B. *The facts stated in the complaint constitute a cause of action.*

The second assignment of error alleges error in the overruling of the demurrer to the complaint. The demurrer argued below and ruled upon was appellant's general demurrer. We shall therefore follow the line of former argument.

The complaint, after setting forth the corporate existence of the several defendants, describes the Gila River and its affluents, the San Francisco River and Chase Creek, and alleges the public nature of the streams and pure character of water prior to the commission of the acts of the defendants complained of. It further sets forth the description of plaintiff's premises; the appropriation of water from the Gila River in 1872 therefor, and its continuous use since. Paragraph 4 describes the Montezuma Canal, through which the plaintiff obtains his water, which supplies some 3750 acres of land. Paragraph 5 describes the Upper Gila Valley, where some 23,000 acres of land are farmed by means of irrigation waters diverted from the Gila River, supporting several towns; in all a community of more than eight thousand people. Paragraph 6 describes the mining operations of the defendants and alleges that they treat

more than 100,000 tons of copper ore each month, the waste from which, consisting of finely pulverized rock and slimes and sediments, is allowed to flow into the streams and thence carried to the lands of plaintiff and others like situate. Paragraph 7 alleges that the tailings from the several mills of the several defendants become commingled and indistinguishable, and that all of the defendants contribute to the injury complained of by the plaintiff. Paragraph 8 alleges that the appropriation made by the defendants for milling purposes and the erection of their mills was later in point of time than the appropriation by the plaintiff. Paragraph 9 sets forth the extent to which Chase Creek, the San Francisco River and the Gila River have been filled with slimes and that these slimes and tailings are carried down upon the lands of the plaintiff to their injury and that the damage is increasing and unless restrained by the court the lands of the plaintiff will be wholly destroyed. Paragraph 10 sets forth the poisonous nature of the substances deposited in the Gila River. Paragraph 11 describes in detail the injury to plaintiff's land, alleging that the waters appropriated by plaintiff were at all times fouled by the finer tailings and that they are carried out on the lands of plaintiff, covering the soil with a coating of inert matter, impervious to air and not readily soluble in water, which destroys the crops growing thereon, and decreases the fertility thereof to the great and increasing injury of plaintiff. Paragraph 12 alleges that the injury to plaintiff's land is continuous and increasing, and that plaintiff has no adequate remedy at law, and that the defendants threaten to, and will, unless restrained by the order of the court, continue to deposit and increase the deposit of tailings, to the damage of plaintiff.

The prayer is that an injunction issue to the defendants perpetually restraining them from depositing in the waters of the Gila River slimes and tailings, and for other and further relief.

The complaint is found at pages 1 to 8 of the Transcript of Record.

The only contention urged by the appellant below in support of the demurrer was that this being concededly an

action by a private individual to enjoin a public nuisance, plaintiff had failed to allege facts showing that he suffered a special injury differing not only in degree but in kind from that suffered by the public as to whom that nuisance existed.

The appellant is insistent that not only must special injury be shown, but such injury must differ in kind from that suffered by the public before the plaintiff may maintain his action. As pointed out by the Arizona court (Opinion at page 37, Transcript of Record) these are the words in which the rule is stated by most of the state courts. The rule as laid down by this court in the case of Georgetown vs. Alexandria Canal Company, 12 Peters, 91, is in simpler language: "The principle then is, that in case of a public nuisance where a bill is filed by a private person, asking for relief by way of prevention, the plaintiff cannot maintain a stand in a court of equity, unless he avers and proves some special injury."

In Mississippi and Missouri R. R. Co. vs. Ward, 2 Black, 485, it is said: "A bill in equity to abate a public nuisance, filed by one who has sustained special damages, has succeeded to the former mode in England of an information in Chancery, prosecuted on behalf of the Crown, to abate or enjoin the nuisance as a preventive remedy. The private party sues rather as a public prosecutor than on his own account; and unless he shows that he has sustained, and is still sustaining individual damage, he cannot be heard. He seeks redress of a continuous trespass and wrong against himself, and acts in behalf of all others, who are or may be injured."

Without stopping to discuss the proper phrasing of the rule, but accepting the statement of the rule as laid down by the state courts, it is a simple matter to demonstrate that the plaintiff shows a special injury differing in kind from that suffered by the general public.

The public, which has the right to have the Gila River flow in its unpolluted state, consists of many classes: the merchant, the banker, the doctor, the stock grower, the farmer, of which latter class is the plaintiff. All classes would suffer if the prosperity of the community is dimin-

ished by reason of the acts of the mining company complained of. The doctor, the banker, the merchant, has no property right in the waters of the Gila River. The farmer, and particularly the appellee, who has, under the laws of the state, appropriated water for the irrigation of his farm, has a property right in the waters of the Gila River. That right is an appurtenance to his land. The acts of the appellant are a direct invasion of his right of property. The injury which he suffers is the direct result of such acts. His injury is special and differs in kind from that of the other classes of the community who suffer generally and remotely from the same acts.

> "This class of wrong of different nature and effect that invades private rights as well as public, always has been and always can be redressed by suits in favor of those whose private rights are invaded, even though it opens the door for a multitude of actions for the same wrongful act. The distinction is this: Where a private personal right is invaded, the very fact of its invasion imports a consequent damage. * * therefore any injury to such private rights even though its effects are so general as to bring it within the rule as to public nuisances is such special and peculiar damage as brings it within the beneficial operation of the rule in reference to suits for injury arising from public nuisances."

Wood on Nuisances, Section 689.

The appellee has demonstrated the sufficiency of the complaint as alleging a special injury different in kind from that suffered by the public generally. It moved to strike from the complaint all the facts alleged therein tending to show that the acts complained of were a public nuisance. With these allegations stricken from the complaint, it was conceded on the argument of the demurrer that the complaint even then stated a good cause of action. As the trial court remarked, the complaint stripped of its allegations with respect to the public nature of the nuisance would yet constitute a good cause of action for an injunction, based

upon the recurrent trespasses committed by the defendant upon the plaintiff's property, which trespasses were continuing in their nature and not susceptible of recompense in an action for damages at law.

No such allegations will be found in that class of cases where the court has refused injunctive relief to a private party upon a complaint against a public nuisance. In those cases, when they are analyzed, it will be seen that the complaint is for the deprivation of a right common to the public and not an injury to private property. In this case upon the arguments of the motions to strike, it was urged that the complaint which tended to characterize the acts of the defendants as a public nuisance, that such allegations were mere makeweight. This the plaintiff did not and does not concede. He contends that he has the right to preclude the defendant from urging any defenses which might be valid as against a purely private trespass by setting forth and proving the public nature of the injury complained of and showing that as a direct consequence of the same cause which constituted a nuisance as to the public he has suffered a purely private injury special to himself, different in kind from that suffered by the public, and an invasion of his purely private right of property.

C. *The plaintiff is entitled to the injunctive relief granted.*

The third and fourth assignments of error raise generally the question of the correctness of the judgment of the Supreme Court of Arizona.

It is difficult to determine from these assignments what line of argument is to be presented in appellant's brief. We shall therefore set forth our contention and answer several of the arguments advanced by the appellant in the court below, believing that the argument here will be along the same general lines.

A reading of the facts as found by the Supreme Court of Arizona and certified to this court (p. 53, Transcript of Record) shows that in all essential particulars the proofs offered sustained the allegations of the complaint. The de-

fendant company concentrating three thousand tons of mineral bearing rock each day was, prior to the institution of this suit, allowing the tailings from its mills to flow directly and indirectly into the irrigation waters which were the sole means of cultivating thousands of acres of farming land in the Gila Valley. A large portion of these tailings were, in the normal course of irrigation, deposited upon the lands of the appellee and other lands described in the complaint. They were first noticed upon the farming lands some six or eight years before the commencement of the suit, and the quantity of such slimes, slickens and tailings so deposited continuously increased until after the institution of the suit. These slimes and tailings so carried upon the lands of the appellee consist of finely pulverized rock, are inert, and contain nothing of fertilizing value to the lands of the appellee. They injuriously affect the cultivated lands for the purposes of raising crops in that they become deposited upon the surface in constantly increasing depth, being deposited to a greater depth near the points at which the water is applied to the land for the purposes of irrigation and become progressively thinner as the water passes over the said lands farther from the points of immediate diversion and application. The injurious effect upon the land and crops is largely mechanical by elevating the land adjoining the point of immediate application of the water, thus compelling the taking of the water supply at increasingly higher water levels; second, in that the deposits form a compact layer over the soil not readily permeable by water, thus depriving the roots of the plants of appropriate and necessary irrigation; and third, in that they pack about the crowns and stems of the growing plants, thus choking and burying them, seriously injuring their growth and productiveness. That during the major portion of the year the Gila River, prior to the deposit of tailings therein, flowed clear and at such times, being normally the periods of low water in said river, there is greatest need of irrigation. For a period of a year or two prior to the institution of this suit the waters carried such great volumes of slimes and tailings that layers unmixed with other substances were deposited in some of the irrigating ditches more directly affected thereby and on the soil near the

points of immediate application of water of a thickness of half an inch or more. That the appellee was injured in the loss of productivity of his fields of alfalfa in the year preceding the filing of this suit by reason of these deposits in an amount which the court was unable to exactly determine, in excess of one thousand dollars, and that from the said cause crops of alfalfa grown upon other cultivated lands mentioned, were damaged to the amount of many thousands of dollars. That the injuries complained of are continuous and constantly increasing.

The propositions of law upon which the appellee has based his case are these:

(a) Pollution of irrigating streams by mine tailings is a nuisance and becomes a public nuisance when the injury and inconvenience therefrom becomes general in its effect upon a community.

(b) It may be enjoined at the suit of a private individual who suffers a special injury therefrom.

A. *Pollution of an irrigation stream by mining tailings is a nuisance and becomes a public nuisance when the injury and inconvenience therefrom becomes general in its effect upon a commnnity.*

Woodruff v. North Bloomfield Gravel Mining Co., 18 Fed. 753.

McCarthy v. Gaston Ridge, etc., Co., 144 Cal. 542, 78 Pac. 7.

Chessman v. Hale, 31 Mont. 577; 79 Pac. 254; 68 L. R. A. 410.

Weil, Water Rights in Western States, Secs. 524-528.

The doctrine of riparian rights does not prevail in Arizona. Nevertheless, the rule as adopted in arid regions of the United States against the pollution of waters of irrigation streams is even more strict than that of the eastern portion of the United States where mining is practiced and riparian rights obtain.

Suffolk G. M. & M. Co. vs. San Miguel M. & M. Co., 9 Colo. App. 407; 48 Pac. 828.

Humphreys Tunnel & Min. Co. vs. Frank, 46 Colo. 524, 105 Pac. 1093.

The rule may be fairly stated in these words:

That each user of water is entitled to such use thereof as is indispensible for the purpose for which he has appropriated the water, but in making such use he may not pollute or deteriorate that which he does not use to the injury of prior appropriators.

Weil, Water Rights in the Western States, Par. 524.

It is true that the opinion in one of the early California cases, an action between mining companies, states that deterioration of the water supply resulting from mining operations is an injury without damage.

Bear River, etc., Co. v. New York Mining Co., 8 Cal. 327.

But in case of Pilot Rock Creek Canal Co. v. Chapman, 11 Cal. 161, the Court said:

> "It has nowhere been held that a defendant is not responsible for injuries done the ditch of another by the deposit of mud and sediment in it. The doctrine of the Bear River Co. v. New York Mining Co., 8 Cal. 327, probably went quite as far as it ought to have gone, when confined to the express points there announced, and we certainly feel no disposition to extend it further."

Again in the case of Hill v. Smith, 27 Cal. 476, the Court says:

> "The maxim, *sic utere tuo ut alienum non laedas,* * * has lost none of its governing force; on the contrary, it remains now, and in the mining regions of this State, as operative a test of the unlawful use of water as at any time in the past, or in any other coun-

try * * . Yet the maxim above mentioned upon which the rule is founded is equally applicable to the ditch owner and to the miner as to the riparian proprietor, and neither can so use the water as to injure or prejudice the prior rights to a like use by the other.

"No person, natural or artificial, has a right directly or indirectly, to cover his neighbors land with mining debris, sand or gravel, or other material so as to render it valueless."

Hobbs vs. Canal Co., 66 Cal. 161; 4 Pac. 1147.

"A subsequent appropriator of water from a natural stream has no right to destroy the ditch of a prior appropriator or to materially diminish the quantity or deteriorate the quality of water to which the latter is entitled."

Junkans vs. Bergin, 67 Cal. 267.

"A placer miner has a right to deposit tailings in the running stream to a reasonable extent but not the right of depositing tailings or debris on the land of one below so as to substantially injure and ruin the same, and the rule is not changed by the fact that the mining operation could not be successfully carried on without inflicting the injury."

Fitzpatrick vs. Montgomery, 20 Mont. 181, 50 Pac. 416.

Says Mr. Justice Field in the case of Atchison v. Peterson, 87 U. S. 507 (20 Wallace), 22 Law. Ed. 414 at 417:

"What diminution of quantity, or deterioration in quality will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied. A slight deterioration in quality might render the water unfit for drink or domestic purposes, whilst it would not sensibly impair its value for mining or irrigation. In all contro-

versies, therefore, between him and the parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant."

"In any case deterioration in the quality of water so as to render it less fit for the first appropriator gives him a right to complain."

Crane vs. Winsor, 2 Utah 248.

(b). *A public nuisance by the pollution of an irrigation stream may be enjoined at the suit of a private individual who suffers a special injury therefrom.*

This proposition has been fully argued heretofore upon the second assignment of error raising the question of the sufficiency of the complaint as against general demurrer. That the facts proven suffice to bring the case within the rule is demonstrated by the findings upon which the case is certified here. These findings show that every essential allegation of the complaint was established upon the trial.

The three contentions which were urged in the court below against the granting of injunctive relief and which will doubtless be urged by the appellant in this court were:

(1). That mining companies conducting operations without negligence in the usual and customary manner and using all reasonable efforts to prevent injury to the agricultural interests of the valley are not liable for the resultant damage.

(2). That inasmuch as the company showed that at the time of the trial it had by its efforts largely minimized the injury to the appellee by the construction of works which in large part prevented the tailings from reaching the irrigation waters, the injunction should not be granted.

(3). That inasmuch as to enjoin the deposit of tailings in the stream would result in the closing down of the plants

of the appellant company, throwing thousands of people out of work, the injunction should be refused in the interest of the public under the doctrine of comparative hardship.

(1). *Mining companies conducting operations without negligence in the usual and customary manner and using all reasonable efforts to prevent injury to the agricultural interests of the valley are not liable for the resultant damage.*

As a statement of law, we believe this contention of the appellant unsound. The only cases cited by the appellant below in support of this doctrine were:

Barnard vs. Shirley, 135 Ind. 547-555; 24 L. R. A. 568
Same Case on rehearing, 41 L. R. A. 737.
The concurring opinion of Judge Ailshie in
Hill vs. Standard Mining Co., 12 Idaho, 223; 85 Pac. 907, and
McCarthy vs. Bunker Hill and Sullivan Min. Co., 147 Fed. 981.

These cases are so readily distinguishable from the case at bar upon the facts that an extended review of them is unwarranted. It is enough to point out that in each of the cases the court proceeded upon the assumption of an absolute necessity for the fouling of the waters. No case has been cited, nor have we found a case that states the rule in the broad terms quoted above. Any statement we have found of any form of this rule when read in the light of the facts of the case is limited by an additional element, viz: An absolute inability to conduct mining operations without pollution of the stream. As we have repeatedly pointed out, no such element exists in this case.

In the court below counsel for the appellant in their brief in urging the right of defendant to a reasonable use of the stream for purposes of mining, quote Lindley on Mines, Section 841, 2nd Edition. In this same work, Mr. Lindley (Sec. 840) reviews at length the leading case of Pennsylvania Coal Co. vs. Sanderson, 113 Pa. St. 126, 57 American Cases 445, 6 Atlantic 453, which case finally held

the right of a miner to pollute a stream by draining percolating waters therein where it was the result of the operation of mining in the ordinary and usual manner. The learned author says, in commenting upon the case (page 1519):

> "It must be candidly conceded that the reasoning of these later opinions of the Pennsylvania court goes beyond that on any other case previously found in the books. They announce a doctrine which might become extremely dangerous if generally accepted. The Supreme Court of Indiana has, however, expressly adopted the doctrine in question in Barnard v. Shirley, (Cited by appellant) and it has been in that state applied in several later cases. Their correctness has been denied by the Supreme Court of Errors of Connecticut, which said of them: 'We do not find other cases which take this extreme ground. The Pennsylvania court itself has in subsequent cases been careful to limit the application of the principles lastly announced, * * and has declined to extend it to instances where material was brought to the ground and artificially treated, the refuse and waste being discharged into the streams, and it may be plausibly asserted that these latter cases weaken the force of the rule finally announced in the Sanderson case.' "

The Supreme Court of Pennsylvania in a recent case involving restraining the reduction of ores where reduction caused a public nuisance, speaking of the Sanderson case, says:

> "The changed conditions brought about by the appellee have not resulted from the development and natural use and enjoyment of its own property, as was the situation in Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 5 Atl. 453, 57 Am. Rep. 445, the doctrine of which case has never been, and never ought to be, extended beyond the limitations put upon it by its own facts. There it was said of the coal company: 'They have brought nothing onto the land artificially. The water as it is poured into Meadow Brook is the water

which the mine naturally discharges; its impurity arises from natural, not artificial causes. The mine cannot, of course, be operated elsewhere than where the coal is naturally found, and the discharge is a necessary incident to the mining of it.' Here the furnaces were artificially brought by the appellee onto its lands by being built there by it, and the Mesaba ore converted by the furnaces into iron is also artificially brought there by it."

Sullivan v. Jones & Laughlin Steel Co., 208 Pa. St. 540, 57 Atl. 1065 at 1068, 66 L. R. A. 712.

We believe that the Supreme Court of Arizona has gone as far as the law warrants in saying in this case (Opinion page 38, Transcript of Record): "We do not mean to say that the agriculturist may captiously complain of a reasonable use of water by the miner up the stream, although it pollutes and makes the water slightly less desirable, nor that a court of equity should interfere with mining industries because they cause slight inconveniences or occasional annoyances, or even some degree of interference, so long as such do no substantial damage, but to permit a subsequent appropriator to so pollute or burden the stream with debris as substantially to render it less available to the prior appropriator causes him to lose the rights he gained by appropriation as readily as would the diversion of a portion of the water which he appropriated."

Whether this rule of ordinary care and custom proposed by appellant is sound as a proposition of law makes but little difference so far as the determination of this case is concerned. The conduct by the mining company of its business clearly shows that it cannot bring itself within the rule it proposes. Prior to the institution of the suit, no effort was made to prevent its tailings from reaching the irrigation waters. All three of the company's mills were contributing to the pollution of the stream. After the institution of the suit, by the exercise of ordinary care and an expenditure of fifty thousand dollars, which is trivial as compared with its enormous investment of fifteen millions

of dollars, it stopped the tailings from its concentrators No. 5 and No. 6.

Mr. Olney, one of the witnesses for the farmers, testified as to the conditions when the suit was brought:

> "Mr. Dysart and I went to Clifton to look the situation over last September and to see for ourselves whether or not the tailings were running into the river from the concentrators. * * At that time I went up to the Detroit Copper Company's dam. I could not find that there were any tailings coming from that dam at that time. Tailings were coming from all the plants of the Arizona Copper Company."

Mr. Olney repeated his conversation with Mr. Colquhoun the superintendent:

> "I had a conversation with Mr. Colquhoun in regard to the discharge of tailings from the Clifton mill. He said they were not doing anything to keep the slimes out of the river. He said they had not yet devised a scheme or way by which they thought they could take care of the slimes."

Professor Forbes in his Bulletin No. 53, pages 90 to 93, in evidence, states the condition of the Detroit and Shannon plants June 1906:

> "In many cases, however, dams must be constructed to slacken stream-flow and precipitate sediments. Dams of various sizes and materials may be observed along the Gila where, for industrial reasons, the necessity for them is greater.
>
> "Most notable of these structures are the dams built by the mining companies near Clifton and Morenci, Arizona, across the deep narrow gulches in which this district abounds. Waste materials from the mines are employed in the construction of these dams. The Detroit Copper Company, below one of its mills near Morenci, utilizes the coarser detritus or tailings from its

sulphide ores. These tailings are deposited across the narrow, rocky gulch below the mill by means of a launder of sufficient incline to carry the material. The dam is strengthened by sheets of corrugated roofing built into the upstream side, and by a wing dam so placed as to support the downstream side. With one man to direct the course of the mixed stream of water and tailings, a bank or dam of loose material whose greatest height is not less than 60 feet (June, 1906), has been constructed, behind which lies a reservoir approximately 200 yards long, of very irregular shape and several million (not estimated) cubic feet capacity. The material of this dam being too soft to stand overflow, the pond is drained by means of lumber wells at the lower end, connecting with a flume running out under the dam. The level of discharge is regulated by holes and stoppers in the lumber well. The efficiency of this plant may be judged by the fact that, June 26, 1906, with a stated discharge of 350 gallons a minute of slimes and sands into the upper end of the reservoir, carrying the larger part of 800 tons per day of solids, the well and flume were delivering perfectly clear water at the outlet beyond the dam. At the time of observation, the existing reservoir was probably more than half full of slimes, being stated to have received an average output from the mill of 18,000 to 24,000 tons of tailings a month for a period of about 22 months.

"Molten slag is used in the construction of a tailings dam by the Shannon Copper Company at Clifton. This material is poured to form a solid dike across a nearby gulch, behind which waste waters from the mill are impounded. These are allowed to spill over the solid crest of the dam. This construction, 60 feet high and 220 feet long, with an approximate retaining capacity of 2,000,000 cubic feet, and at one time receiving about 300 gallons of water and slimes a minute, is stated to have entirely clarified the water, carrying 400 tons of tailings a day, from this mill for a period of more than six months."

It can hardly be said that the Arizona Copper Company was using all reasonable efforts to prevent injury to

the agricultural interests when their own superintendent says they were making no effort to keep the slimes out of the stream. If, as the evidence shows, there are three companies operating in the same district, in the same ores, using similar processes of concentration, and two of the companies avoid polluting the stream and the third company makes no effort to avoid such pollution, such company is not operating in the usual and customary manner.

As to the concentrator at Clifton, it is not intemperate to characterize the location of the mill as a wanton disregard of the rights of the water users farming lands in the Gila Valley. The company, when it located this mill, unquestionably knew that the water of the San Francisco River was used for irrigation purposes. Nevertheless, the company placed this mill directly on the San Francisco, knowing that in its operation they proposed to dump literally millions of tons of pulverized rock immediately into the stream. To a thoughtful mind, considerate of the rights of others, possible injury to the farming interests would have been instantly suggested.

(2). *Inasmuch as the company showed that at the time of the trial it had by its efforts largely minimized the injury to the appellee by the construction of works which in large part prevented the tailings from reaching the irrigation waters the injunction should not be granted.*

This contention was seriously urged in the trial court and was suggested but not seriously urged in the appellant's brief in the Supreme Court of Arizona. Whatever might have been the determination of the trial court had the appellant succeeded in as effectually stopping the flow of tailings from the Clifton mill as from Concentrators Nos. 5 and 6, it is clearly apparent that with the Clifton Concentrator still in operation at the time of the trial pouring hundreds of tons of tailings into the stream, the appellee was entitled to the injunction granted. It was only after the granting of the injunction as shown by the reports of the inspector that the conditions at Clifton were remedied. (P. 51, Transcript of Record).

(3.) *That inasmuch as to enjoin the deposit of tailings in the stream would result in the closing down of the plants*

of the appellant company, throwing thousands of people out of work, the injunction should be refused in the interest of the public under the doctrine of comparative hardship.

The doctrine of comparative hardship has no application in this case. It was pressed upon the trial court and upon the appellate court. There is no suggestion in the complaint that the works of the appellant company be shut down. The farmers recognize the fact that their prosperity is to a large extent dependent upon the prosperity of the mining companies, but they are insistant that the mining company shall not prosper at the cost of the destruction of the farming community. The record shows the entire want of necessity for any closing down of the works of the appellant company. The appellant proved in its own case that it had taken care of the tailings from Concentrators 5 and 6, and since the appellant has included in the Transcript of Record the various orders suspending the injunction and the reports of the inspector, they have demonstrated of record that they can take care of the tailings from their Clifton plant and continue to operate it.

Neither the trial court nor the Supreme Court of Arizona found that the granting of the injunction would entail any damage to the mining industry at Clifton, and upon this ground the various cases relied upon by the appellant in its brief below wherein an injunction has been refused under an application of this doctrine of comparative hardship may be distinguished. The cases which they cited below in support of the rule are:

Wees vs. Coal & Iron Co., 54 W. Va. 421, 46 S. E. 166.
Mountain Copper Co. vs. U. S., 142 Fed. 625.
McCarthy vs. Bunker Hill Co., 147 Fed. 981.
Madison vs. Ducktown Co., 113 Tenn. 335, 83 S. W. 658.

to which we may add the cases of

Bliss vs. Anaconda Copper Min. Co., 167 Fed. 342, and
McCarthy vs. Bunker Hill Co., 164 Fed. 927.

The case of Wees vs. Coal and Iron Railway Company, *supra*, was an action by private individuals to enjoin the

obstruction of two public roads by the defendant in the construction of its railroad. The question of comparative inconvenience in granting an injunction was incidentally considered.

The case of Mountain Copper Company, Limited, vs. the United States, supra, was a case before the circuit court of appeals of the Ninth Circuit. It was heard before Gilbert and Ross, Circuit Judges, and Hawley, District Judge. The opinion is by Ross, Circuit Judge, with a dissenting opinion by Judge Hawley. It is clear from a reading of the opinion that the court was convinced that to grant the injunction would result in the shutting down of a copper smelter and the destruction of a great industry.

In the case of McCarthy vs. Bunker Hill, etc., supra, the application was for a permanent injunction. The district judge found that to grant the application would result in the shutting down of the works, hence his application of the doctrine of comparative hardship.

In the case of Madison vs. Ducktown Co., supra, the court below regarded the question involved as being one resulting in the destruction of the industry. Say the court: "Shall we go further and grant the request to blot out two great mining and manufacturing enterprises, destroying half of the taxable values of a county and driving more than ten thousand people from their homes."

In the case of Bliss vs. Anaconda Copper Mining Company, supra, that court too regarded the question as being one involving the destruction of the industry. Says Hunt, J.: "Although he alleged in the amended bill that he would show that the poisonous substances emitted from the smelter could be precipitated and impounded at the smelter with very little extra cost to the defendants, he offered no proof whatsoever to support the allegation, but chose to put himself on the ground that injunction must issue which will stop the works and prevent the treatment of the only ores that defendants now smelt. Thus we are confronted directly with the underlying question whether injunction

must issue without regard to all the circumstances existing in the particular case."

In the case of McCarthy vs. Bunker Hill Co., supra, being an appeal from the judgment of the circuit court, reported in the 147 Federal 981, the court starts with the assumption that, "It is practically conceded on behalf of the appellants that the granting of the injunction to which it is insisted they are entitled must necessarily result in closing those great operations in the Coeur d'Alene region, in the depopulation of that section of the country, the destruction not only of the mining business there but the business of numerous towns * * dependent upon that industry." Assuming that such would be the result of the granting of the injunction, the court affirms the judgment of the court below applying the doctrine of comparative hardship.

Without multiplying cases, enough have been referred to to show that this doctrine has been applied by those courts which accept it only where the granting of the injunction would result in the destruction of a lawful business and great injury to the public.

The Supreme Court of Arizona declined to apply the doctrine of comparative hardship in its opinion (p. 40, Transcript of Record), the court saying:

> "However, if we felt called upon to undertake the task of comparing the injury that must result to the two communities, we are not certain that the comparison would result favorably to the appellant. While the testimony shows, and the trial court found, that the appellant has invested about fifteen million dollars and gives employment to about three thousand men, and that many others are dependent upon the operation of its properties, the testimony also discloses that but one of its three concentrators will be affected by the injunction; that the slimes and tailings from the others are impounded and do not find their way into the river; and it is not shown just what hardship will result to the corporation or community from the closing of this concentrator. Upon the other hand, the one principal industry of the upper Gila Valley, alfalfa

raising, will suffer great injury and possible destruction if the injunction be refused. The destruction of that industry, or even serious injury to it, will in a measure bring disaster to a large and prosperous community. In our opinion a court should exercise great care, but should not refuse relief where the injury is substantial and the right clear."

The findings of fact certified to this court show that the defendant has by reason of its failure to properly care for the waste from its milling plants caused a public nuisance which has already resulted in serious injury to the appellee, which injury is continuing and threatens ultimately to destroy the productiveness of appellee's land unless it is stopped. The mining company has demonstrated that it is able to abate the nuisance.

The findings of fact and the authorities cited support the judgment of the Supreme Court of Arizona, and it is respectfully submitted that such judgment should be affirmed.

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
Attorneys for Appellee.

ARIZONA COPPER COMPANY, LIMITED, *v.* GILLESPIE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 106. Argued January 27, 28, 1913.—Decided June 16, 1913.

In Arizona, by statute, all rivers, streams, and running waters are declared public, and may be used for purposes of milling, mining and irrigation. The first appropriator is first in right to the extent necessary for his purposes; and neither the user for mining purposes nor the user for agricultural purposes is placed upon a higher plane than the other.

Where users of waters are placed, as in Arizona, upon the same plane, the rights of lesser users are not subordinated to those of greater users; nor is a wrong done by one to the other condoned because of the magnitude or importance either of the public or the private interests of the former.

Where one of several users of waters is wrongfully injuring the others there is a remedy either at law or in equity; the latter depending upon circumstances including the comparative injury of granting or refusing an injunction.

Where, as in this case, the record does not show the damage which the injunction might cause the defendant, but does show that the interests of complainant and others of his class might be irreparably injured by a continuance of the nuisance, equity may grant relief.

The limitation of necessary use on the right of an appropriator of water applies to quality as well as quantity; and the right to use necessary water does not include the right to so destroy the quality of all the water not used as to continuously injure the property of the other appropriators.

The maxim *sic utere tuo ut alienum non lædas* applies in Arizona and elsewhere to the use of waters by one appropriator as against another.

Although the nuisance may be a public one and others may be damaged thereby, one who shows that he suffers a special grievance not borne by the public, may maintain a separate action for equitable relief.

In this case *held*, that the contamination of waters in Arizona by a copper plant constituted a nuisance as to the lower appropriators and, under the circumstances, an injunction was properly granted, the Supreme Court of the Territory having provided in the decree that the defendant might have the injunction modified on constructing remedial works to prevent contamination. *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230.

12 Arizona, 190, affirmed.

THE facts, which involve the relative rights of appropriators of water in Arizona and the jurisdiction of a court of equity to enjoin the contamination of the water by an upper appropriator using the water for mining purposes in favor of a lower appropriator using it for agricultural purposes, are stated in the opinion.

Mr. John A. Garver and *Mr. Walter Bennett* for appellant:

Even if the acts complained of constituted a public nuisance, the injury to the plaintiff did not differ in kind from that sustained by other members of the community in which the plaintiff's farm was situated; and, consequently, the plaintiff could not maintain the action. Joyce on Injunctions, § 1081; *Live Stock Co.* v. *McIlquan*, 14 Wyoming, 209; *Donahue* v. *Stockton Gas &c. Co.*, 6 Cal. App. 276, 280; *Kuehn* v. *Milwaukee*, 83 Wisconsin, 583; *Jarvis* v. *Santa Clara*, 52 California, 438.

The injury to the plaintiff did not differ in kind from

that sustained by the other members of the community; consequently, plaintiff could not maintain the action.

All streams of running water in the Territory were made public, for the purposes of irrigation and mining, including, necessarily, as one of the incidents of the latter, the use of water in the reduction of the ores. See Rev. Stat. 1901, Arizona, Par. 4168, § 1; Par. 4169, § 2; Par. 4174, § 7; Par. 4178, § 11; Par. 4179, § 12; Par. 4180, § 13; Par. 4196, § 29, which are substantially identical with Rev. Stat. of 1887, §§ 3198–9, 3203–5.

As the mining company can lawfully use the streams for the purposes of its business, such use cannot be unlawful or constitute a public nuisance, unless the company so wilfully or carelessly uses the water as to infringe upon the rights of others. Kinney on Irrigation, §§ 250, 251; 40 Cyc. 708, 713; *Hill* v. *Standard Mining Co.*, 12 Idaho, 223, 236; *Bernard* v. *Sherley*, 135 Indiana, 547, 555.

Nothing of that kind was found by the court below, and nothing of the kind is alleged in the complaint.

Even if the mining industry had not been so clearly authorized by the legislature, it is the paramount industry of the State and overwhelmingly dominates all the other industries. The public convenience will always be considered in determining whether certain acts constitute a nuisance. Pomeroy's Eq. Remedies, § 529.

Appellee has no exclusive or superior rights as prior appropriator.

The common-law doctrine of riparian rights has not obtained in Arizona since 1887; and it probably has never been recognized there. Rev. Stat. 1887, § 3198; Rev. Stat. 1901, § 4169; *Boquillas Co.* v. *Curtis*, 213 U. S. 339.

At common law, all riparian proprietors have precisely the same rights to flowing waters, and no one could so use the stream as to interfere with its reasonable use by those above and below him. 3 Kent Comm. 439; 40 Cyc. 559; *New York* v. *Pine*, 185 U. S. 93, 96.

The court below erred in holding that by the abolition of riparian rights plaintiff, as the first appropriator had acquired the exclusive right to the use of the water which could not be interfered with by the defendant. This error was both as to law and facts.

No one could acquire an exclusive right to the use of any stream for the purpose of irrigation. All that a prior appropriator is entitled to, as against others, is a sufficient quantity of water to satisfy his appropriation, while its quality cannot be impaired so as to interfere seriously with the use to which it has been appropriated. Section 22, Political Code Arizona; Kinney on Irrigation, §§ 250, 251; 40 Cyc. 708, 713.

Under the common-law doctrine of riparian rights a lower riparian owner cannot complain of the reasonable use of the stream, even if he is injured thereby. *Merrifield* v. *Worcester*, 110 Massachusetts, 216; *Hayes* v. *Waldron*, 44 N. H. 580; *Strobel* v. *Kerr Salt Co.*, 164 N. Y. 303, 320; *Pennsylvania Coal Co.* v. *Sanderson*, 113 Pa. St. 126, 146.

The principle of priority is not recognized as between an appropriator for irrigation and a subsequent appropriator for mining purposes. The legislature of Arizona in giving precedence to the mining industry merely recognized the fact that the welfare of the State is peculiarly dependent upon the development of its mineral resources.

In view of the natural conditions, it was inevitable that the legislature should have expressly provided that the principal industry of the Territory should not be hampered by claims of prior rights on the part of farmers.

The only duty owing by a mining company to other users lower down the stream using the water for irrigating purposes, is to so conduct its business as not unnecessarily to interfere with the rights of such users.

Even if defendant has operated its reduction works

carelessly, the plaintiff has an adequate remedy at law for the damages sustained.

Under the policy of the law prevailing in Arizona, appellee has no greater right to stop the operation of the appellant's works than he would have to enjoin the construction of a railroad, where the railroad company possessed the power of eminent domain. *Story* v. *N. Y. El. R. Co.*, 90 N. Y. 171, 179; *Am. Bank Note Co.* v. *N. Y. El. R. Co.*, 129 N. Y. 252, 270; *New York* v. *Pine*, 185 U. S. 93, 104.

There is no ground for claiming that the damages sustained cannot be estimated. The mere fact that it might be difficult to assess the exact damages is no reason for granting an injunction. *Wakeman* v. *Wheeler & Wilson Co.*, 101 N. Y. 205, 209.

There should be no absolute injunction because it is unreasonable to close the works completely when efforts are being honestly made to lessen the evil, and because, under the decision below, no showing is possible that the appellant can exclude all waste material from reaching the water.

In a suit in equity, the conditions existing at the time of the trial control. *Haffey* v. *Lynch*, 143 N. Y. 241, 248; *Dieterich* v. *Fargo*, 194 N. Y. 359, 363; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 342.

There is a distinction between the case of a suit brought by a State and one brought by an individual, and the disposition of this court is to grant equitable relief in the former case but, in the latter, to leave the owner to his action at law. See *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 238.

A permanent injunction will not be granted unless the evidence clearly establishes the invasion of the plaintiff's rights by the defendant, with a resulting substantial injury, and there is no finding that any appreciable injury to the plaintiff's land was caused by the defendant alone.

The injunction should be denied, because it would not materially improve the plaintiff's condition. *Wood* v. *Sutcliffe*, 3 Simons (N. R.), 163.

An injunction will not be granted where the injuries to the plaintiff are slight and where the consequences of the injunction to the defendant and others may be very injurious. 1 Spelling on Injunctions, § 417; *Powell* v. *B. & G. Furniture Co.*, 34 W. Va. 804; *Clifton Iron Co.* v. *Dye*, 87 Alabama, 468; *Madison* v. *Ducktown &c. R. Co.*, 113 Tennessee, 331; *McClure* v. *Leaycraft*, 183 N. Y. 36, 44.

Equity regards relative values. While an emission of smoke might constitute a nuisance in the City of New York, it might afford no just ground of complaint in other places such as Pittsburgh. *Bates* v. *Holbrook*, 171 N. Y. 460, 475.

In the contemplation of personal rights, equity will not lose sight of the public interest. A court of equity is never active in granting relief against public convenience merely for the purpose of protecting a technical legal right. *Smith* v. *Clay*, 3 Brown's Ch. 639, note; *Knoth* v. *Manhattan Ry. Co.*, 187 N. Y. 243; *New York City* v. *Pine*, 185 U. S. 93, 99.

If the judgment in this case is sustained, a precedent will be established that will inevitably affect the entire mining industry of Arizona. To permit the plaintiff to refuse to accept a sum representing the damages actually sustained or likely to be sustained by him, and insist upon an unconditional injunction which will result in obstructing and possibly terminating a great industry, would be to furnish him with a club to compel payment of the sum he deems the measure of his damages. *New York City* v. *Pine*, 185 U. S. 93, 97.

Mr. Ernest W. Lewis, with whom *Mr. Thos. Armstrong, Jr.*, was on the brief, for appellee.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a bill for an injunction to restrain the appellant from polluting a public stream, whereby the appellee has sustained a special injury as a lower proprietor.

The Arizona Copper Company, Limited, is engaged in mining and reducing copper ore near the town of Clifton, Arizona. Its concentration and reduction works, in which ores are treated, are situated upon or adjacent to small streams tributary to the Gila River. Much of the tailings and waste material from the reduction work is carried by the water used in the reducing process into the streams adjacent, or is deposited nearby and is later carried by the rains into the streams, and thence into the Gila River. The appellee, William Allen Gillespie, is the owner of 276 acres of arid land on the Gila River and some 25 miles below the point where the water polluted above finds its way into the river. He has reclaimed this land and brought it into a high state of cultivation, through irrigation, by means of water drawn from the river into the Montezuma Canal, and thence, by ditches, spread upon his cultivated land. In the dry seasons, particularly, this water so used for irrigating purposes deposits upon his land the tailings and waste material so suffered to get into the tributaries of the Gila River from the reduction works of the appellant above.

Gillespie and those preceding him in title began the irrigation and cultivation of this tract of land in or about 1872, and have continuously appropriated a sufficiency of water necessary for irrigating purposes from the river. A large body of like land situated in the same valley has been irrigated in the same way by waters drawn from the Gila River by the Montezuma and other like canals constructed and maintained for irrigating purposes, and a large agricultural community has grown up dependent upon irrigation.

In the mountains through which the streams tributary to the Gila River pass are great deposits of rock containing copper ore, and since 1872 many mines have been operated. Later the ore was treated in reduction and concentration works which have increased in extent of operations from time to time, until at the time this suit was begun the capital engaged aggregated several millions of dollars and 3,000 men were employed in and about the mining and reduction operations. Prior to 1885 the operations carried on by the mining companies do not appear to have polluted the tributaries of the Gila to any serious extent. Later the operations were enlarged and methods adopted which began to more and more seriously pollute the water used for irrigating purposes by the proprietors below. Thus both courts below found,—"That in or about 1885 the first concentrator was erected for the reduction of ore in connection with the mining enterprise herein mentioned; . . . that some six or eight years before the institution of this action, the water of the Gila River, at other than flood periods, theretofore clear, became discolored by slimes, slickens and tailings and began to deposit such slimes, slickens and tailings through the irrigating ditches herein mentioned in the normal and necessary course of irrigation upon the lands of plaintiff and other lands herein mentioned." The court below further found that the quantity of such waste material carried by the river and deposited upon the lands of the appellee "continuously increased until after the institution of this suit." The harmful and damaging character of these deposits was found in most explicit terms by the court below, and the character of the injury elaborately explained. The appellee's bill alleged that the injury to his crops and to his land was continuous and that his remedy at law was inadequate, and his prayer was that the appellant be perpetually enjoined from polluting the streams to his injury.

Originally there were two other corporate defendants and like relief was sought against them. One was found to be improperly a party and the bill was dismissed as to it. The other defendant was the Shannon Copper Company. As to that company the court below found:

"That after the commencement of this action and before the hearing of this cause the Shannon Copper Company, in consideration of the dismissal of this action as to it, agreed to spare no reasonable effort or expense to minimize the amount of said tailings and waste material from its said works which may find their way into said river, and if possible to do so by any reasonable effort and expense, that it would prevent the flow of any of said tailings and waste material from its said works from flowing into said river, and that said efforts should be made at once, and continued without interruption until the object thereof should be accomplished."

The District Court made a full finding of facts and enjoined the appellant from "in any manner depositing or suffering or permitting to be deposited, or suffering or permitting to flow into the waters of the said Gila River, or into the San Francisco River or said Chase Creek in such manner that they may be carried into the waters of said Gila River, any slimes, slickens or tailings."

This judgment was to go into effect January 1, 1908. But when the record was filed, upon appeal, in the Supreme Court of the Territory, that court, upon a bond being executed, suspended its operation until the case should be determined by it. Upon a final hearing that court confirmed the findings of fact by the court below, but modified its judgment by permitting the appellant, at its own expense, "to construct settling basins at or near the heads of the canals, or elsewhere along the river, by means of which the tailings and slimes carried by the Gila River from appellant's concentrators may be arrested and prevented from being deposited upon the farming lands."

"This suggestion," said the court in its opinion made part of the judgment, "does not appear to have been presented to the trial court, and its decree is so drawn that such means of relief may not be availed of since appellant is enjoined from permitting any tailings or slimes to reach the waters of Gila River. We think, to enable the mining company to take advantage of any efforts it may make in this direction, it should be left to the discretion of the trial court hereafter upon a proper showing made to it temporarily to modify the injunction so as to permit of reasonable experiments being made to ascertain the probability of successfully erecting and maintaining settling basins to effectually dispose of the tailings and slimes without detriment to the lands lying under the canals, and with authority in the District Court likewise permanently to enforce or modify the injunction in accordance with the conditions as they shall be found to be." Thus modified, the judgment was affirmed. Later, it being made to appear that the appellant had designed and put into operation large settling basins and otherwise attempted to arrest, settle and dispose of the slimes, slickens and tailings from its works, and had succeeded in arresting much of the waste material, and was in good faith operating and maintaining such works, the court suspended the operation of the judgment pending an appeal to this court.

In Arizona, by statute, all rivers, streams and running waters are declared public, and may be used for purposes of milling, mining and irrigation. The first appropriator is first in right to the extent necessary for his purposes.

Whatever advantage there may be in a first appropriation of water is with the appellee. There is no question about the quantity of water appropriated by the upper user, the objection being that the quality of the water which comes down to the lower proprietor after it is used by the Copper Company is no longer fit for irrigating purposes. Whatever the relative importance of the great

mining and reduction works, using the water on the upper reaches of the Gila River and its tributary streams and of the agriculturists using the same water below, from either a public or private point of view, the right of the lesser interest is not thereby subordinated to the greater. That is sometimes a consideration when a plaintiff seeks relief by injunction rather than by an action at law for damages. The wrong and injury, whether it results from pollution of a stream or otherwise, is not condoned because of the importance of the operations conducted by the defendant to either the public or the wrongdoer, and for that wrong, there must be a remedy. Whether upon a bill such as this a court of equity will restrain the acts of the party complained of, or leave the plaintiff to his action at law for damages, must depend upon the nature of the injury alleged, whether it be irremediable in its nature, or whether an action at law will afford an adequate remedy, and upon a variety of circumstances, including the comparative injury by granting or refusing the injunction. *Atchison* v. *Peterson*, 20 Wall. 507.

The court below found that but one of three concentrators operated by the appellant would be affected by an injunction, and that the extent of the hardship from closing that concentrator had not been shown. On the other hand, the court found that the agricultural interests of a large and prosperous community would suffer great injury and possible ruin, if the pollution should go on.

The Arizona statute places a water user for mining purposes upon no higher plane than a user for irrigation. The suggestion that the right to use for mining and reduction purposes cannot be exercised without polluting the streams with waste material, tailings, etc., and that the lower user cannot, therefore, complain of the necessary consequences of the legal right conferred by statute, is without force. The only subordination of one water user to another is the right of the first appropriator to a suffi-

ciency of water for his necessary uses. That includes the quality as well as the quantity. What deterioration in the quality of the water will constitute an invasion of the rights of the lower appropriator will depend upon the facts and circumstances of each case, with reference to the use to which the water is applied. *Atchison* v. *Peterson, supra.* In giving a right to use the waters of the public streams for mining purposes, the statute does not provide that such a user may send his waste material or debris down the stream to the destruction or substantial injury of the riparian rights of users of water below, and no such invasion of private property rights should be inferred or implied from the right to use water for mining purposes. *Woodruff* v. *North Bloomfield Mining Co.*, 18 Fed. Rep. 753. The maxim *sic utere tuo ut alienum non lædas* is as fully recognized in the jurisprudence of Arizona as it is elsewhere, and that was the maxim which governed the decision of this case in the courts of Arizona.

That the contamination of the waters of the Gila River constituted a public nuisance which affected a large community of riparian owners and users of the waters for purposes of irrigation, may be true. That as a public nuisance a public prosecution for its abatement might have been maintained, may be also conceded for the purposes of this case. But it is equally true that the appellee had and would continue to suffer a special injury not borne by the public.

Here the appellee alleged a special grievance to himself affecting the enjoyment and value of his property rights as a riparian owner and as an individual user of the water for purposes of irrigation. This gives him a clear right to apply for preventive relief. *City of Georgetown* v. *Alexandria Canal Co.*, 12 Peters, 91, 98; *Mississippi & M. R. Co.* v. *Ward*, 2 Black, 485.

The modification of the decree of the trial court so as to enable the appellant to complete the construction of the

remedial works specified and heretofore mentioned, met every reasonable equity which was asserted by it. It is in substantial accord with the decree of this court in a somewhat similar case. *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230. We find no error in the decree of the court below and it is accordingly

Affirmed.